Before the
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

In the Matter of:		
Expedited Consideration for Declaratory Rulings	)	
On the transfer of traffic only under AT&T	)	
Tariff Section 2.1.8, and Related Issues.	)	
	)	
Primary Jurisdiction Referral	)	
from the NJ District Court	)	
.	)	CCB/CPD 96-20
	)	DA – 06-2360
	)	WC Docket No. 06-210
One Stop Financial, Inc	)	
Group Discounts, Inc.	)	
Winback & Conserve Program, Inc.	)	
800 Discounts, Inc.	)	
Petitioners	)	
	)	
and	)	
AT&T Corp.	)	
Respondent	)	

PETITIONER'S REPLY COMMENTS

To FCC:
Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary

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I **Shortfall Charges- June 17th 1994 Grandfathered**
AT&T Offers No Defense

1) Petitioners will first address the shortfall issue as AT&T's Dec. 20th 2006 submission concedes that petitioners CSTPII/RVPP plans were grandfathered at the time of the Jan 1995 traffic only transfer and thus immune from shortfall. ATT did not refute petitioner's analysis that the CSTPII/RVPP plans would have still been immune from shortfall and termination well past the June 1996 infliction of shortfall and termination liabilities.

2) Placing the shortfall issue upfront will enable the FCC to see from the start of this brief that AT&T's rhetoric that it stopped the traffic transfer due to fraudulent use provisions can be seen in the light that it was a totally bogus defense. Petitioners will then show beyond the shadow of a doubt that the revenue commitments and hence the plans shortfall and termination obligations stay with the transferor (CCI/Inga).

AT&T asserts on page 32 para 2:

> By its plain terms, however, the tariff did not create a class of CSTPII plans that could be "restructured" again and again **without ever** being subject to shortfall obligations.

3) AT&T makes a statement that was not asserted by petitioners in its initial Sept 27th 2006 filing. Petitioners requested the FCC to interpret the June 1994 grandfathering provision based upon the undisputed fact that the plans were 3 year plans and should have been allowed to restructure its revenue commitment under

the pre June 17th rules for just the three year period after June 17th 1994 not forever; which petitioners agreed was a disputed fact in 2003 FCC Decision.

AT&T again asserts on page 32 para 2:

> Rather, the grandfather clause provided a **one-time exemption** from prorated shortfall charges when a pre-June 17, 1994 **plan** was "cancelled," and replaced with a "**new**" plan.

4) AT&T asserts in the above cite that it is the **plan** that is exempt. The plan was a three year plan not a one year plan.

The tariff states at section 6: (exhibit CC to petitioners initial filing)

A CSTPII expires when the three year term ends.

All CSTPII plan at issue are 3 year plans. The commitments are made up front to AT&T and the revenue CCI/Inga committed to has to be treated under the rules that existed at the time of the commitment.

Judge Politan said it best in the District Court's non vacated Decision:

> Plaintiffs cannot be held to construe the section governing transfers under the tariff as meaning that which it does not. Words mean what they say. **Rules should not be changed in the middle of the game; and certainly without notice.**

5) It would be a violation of 201(b) to trap aggregators into long term revenue commitments that were based upon 3 year contracts then enact a substantive tariff change that offered no fresh look option.

6) AT&T states that when CSTPII/RVPP plans are restructured it constitutes a **new** plan. However exhibit EE in petitioner's initial filing is an AT&T (restructured) upgraded contract, indicating the 3 year option (option B) revenue commitment. Notice: 1) the "upgrade" check box was selected not the "new plan" checkbox, and 2)

the upper right corner shows existing RVPP ID used; a **new** RVPP ID was not being assigned to make it a **new** plan.

7) The tariff explicitly states that a customer must order a **new** RVPP when ordering a **new** plan. If the existing RVPP ID is used AT&T would call it a Term Assumption Starting Date (TASD), which would not constitute a new plan.

8) There is nothing in the tariff that states that a "discontinued without penalty" plan referred to as a restructure, is a **new** plan and AT&T know it. AT&T's own Network Services Commitment Form contract supports that a restructure, referred to as an "upgrade" within AT&T contracts is not a new plan. The term "restructure" is the business jargon that was used to describe what the tariff refers to as "Discontinuance without Liability" and in AT&T contract terms (Network Services Commitment Form) it is indicated as an upgrade of a plan. [1]

[1] Restructuring /Upgrade Example: A three year commitment of $12,000 per year ($36,000 over 3 years), restructured the commitment at the end of the 11th month in the first year, it would take the remaining 25 months x $1,000 ($25,000) =$8,333 a year. However, since $8,333 was not a specified commitment level the AT&T customer had to increase its yearly commitment to one of the specified commitment levels in the tariff. Thus a $10,000 per year commitment level is taken not the $8,333 figure. The yearly commitment went down by $2,000 per year, $12,000 to $10,000; but there was an **increase in the overall commitment** from originally having 25 months left at $1,000 per month, $25,000 total, to the new $30,000 commitment. (New term assumption starting date (TASD) would result in a contract of 3 years x $10,000 per year = $30,000**).** The time period as well as the total commitment **went up** by $5,000 ($30,000-25,000). AT&T defines this as an **upgrade** and thus **upgrade** is marked on that AT&T contract **not new.** Plans that were ordered prior to June 17th 1994 would be able to restructure the contracts and at the time of restructuring would not have to be meeting monthly prorated revenue commitments. Plans that were taken out after June 17th 1994 would have to meet monthly pro rated revenue commitments. If the plans in this example were post June 17th 1994 plans the aggregator having restructured in the 11th month of its plan would have needed to be doing 11/12th's of its fiscal year commitment or it

9) AT&T's position that the plan loses its status as a grandfathered plan prior to the three years is clearly in violation of its tariff as the CSTPII/RVPP **plan** is grandfathered, and the plan is 3 years. See exhibit FF in petitioner's initial brief, which is the AT&T tariff discontinuation (restructuring) provisions stating:

> The Shortfall Charge will not apply in connection with the discontinuance of a CSTPII that was ordered on or prior to June 17th, 1994.

10) A CSTP is an acronym for Customer Specific Term **Plan.** The tariff does not state that AT&T will only allow the 1st year of a 3 year CSTPII/RVPP. It is the whole CSTPII/RVPP plan, which was 3 years. Furthermore AT&T's tariff distinguishes between one commitment period and year the plan. See exhibit AA in petitioner's initial brief which refers to commitment periods. Obviously there are three commitment periods in a three year plan.

11) AT&T's own managers all interpreted restructured **plans** as **not** being new plans. These are excerpts of audio taped conversations that the NJ District Court has as well as AT&T.

Tape 1 Side B Tom Umholtz (Senior Account Manager):
"Restructuring definitely allows you to NOT pay the penalty."
Tape 7 Side A Joe Fitzpatrick (Direct Account Manager):
"[You] can restructure forever with no penalties as long as the RVPPID stays the same, you will always be a pre-17th plan." (Emphasis added.)
Also, "You can TSA just accounts not the plan."
Tape 13 Side A& B Joe Fitzpatrick:

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would have shortfall liability(ies) inflicted upon its plan. If the plans were pre June 17th 1994 then there would be no shortfall liability(ies) inflicted.

"You can assign accounts from plan to plan."
Also: "Restructuring to avoid shortfalls can be done."
Tape 14 Debra Kibby (Account Provisioning Manager):
"Restructuring is not a new plan, this has always been like this in the tariff."
Tape 15 Side A Joyce Suek & Lisa Hockert (Account Provisioning Managers):
"Restructures are not new plans."
Tape 15 Side B Joyce Suek:
"Plan ID remains pre-June 17th, 1994 even after restructures."
Tape 22 Side A Joyce Suek:
"Need a brand new CSTP plan with a brand new RVPP ID to acquire term contracts of AT&T customers to the aggregator plan".
Tape 22 Side A Joe Fitzpatrick:
"Work procedure issued from AT&T product house that restructures are not new plans."
Tape 23 Side A Janis Bina (Credit and Collections Manager):
"Restructures are not new plans"
Tape 23 Side A Maria Nascimiento (AT&T Manager):
"You will get paid on back end of promos, therefore the restructures have to be considered not new. If they were new then you wouldn't get paid."
Tape 27 Side A Tom Freeberg (AT&T Provisioning Branch Manager overseeing all aggregators):
"Restructures are not new plans because it is not an expiration of a contract. You would have to take out a new plan with a brand new RVPP ID to enroll AT&T users who are under contract."
Tape 27 Side A Ron Orem (AT&T National Division Manager Head of Specialized Markets):
In a conversation regarding AT&T's reinterpretation of their tariff saying that restructures are now considered new, but without AT&T's having filed a tariff revision with the Commission to change these terms, Mr. Orem admits that - "Giving you [the undersigned] an advanced warning would have made a lot of sense."
Tape 27 Side A Lisa Hockert:
"Bottom line, a restructure is not a new plan period!"
Tape 27 Maria Nascimento:
"AT&T is standing by the tariff that restructured contracts were not new plans."
Tape 28 Maria Nasciemento:
"I explained to Maria that AT&T was forcing me to assign all my accounts because they were not providing me a contract tariff."

12) All of the above AT&T mangers interpreted that a restructure of an existing plan was not a new plan. Additionally, exhibit GG in petitioners initial filing are additional excerpts of the audio tapes (which AT&T and the District Court also have a copy) from AT&T managers stating their tariff interpretation was that the plans

were **forever immune** from S&T penalties; however petitioners are only asking the FCC to declare the non disputed tariffed fact that the plans were grandfathered for its 3 year commitments; not forever.

13) AT&T tariff exhibit CC to petitioner's initial filing clearly states the expiration of AT&T's CSTPII/RVPP term plan.

A CSTPII expires when the three year term ends.

See tariff page 2 of exhibit JJ of initial brief allowing Location Specific Term Plans (LSTP) to move to a CSTP if the plan were considered new AT&T considered the restructures as NOT NEW to prevent the aggregator's penalty free access to enrolling AT&T's LSTPII customers.

14) See pg 3 of exhibit JJ which are AT&T tariff pages showing that when you have a new CSTPII you need a **new** RVPP; and option B CSTPII plans are **3 year commitments** as were petitioners'; and customers with existing RVPP **do not** have to subscribe to a new RVPP--- so they stay pre June 17th 1994 grandfathered; however the aggregator can not enroll AT&T LSTPII customers without penalty.

15) AT&T and the District Court also have these audio taped statements of 3 AT&T managers:

Mr. Freeberg: I am saying that the corporation is stating the tariff indicates that a restructure is **not a new plan**, that it is continuous.

Lisa Hockert: Restructure is not a new **plan** period. I take my direction from Rich Kurth directly.[2]
Maria Nasciemento: And it's saying that you have to have a new CSTP **plan** to bring in the LSTP's to. You don't have a new one. **Restructured plans are one thing. New plans is another**.

None of the AT&T managers spoke about commitment periods, they all spoke about the plan being grandfathered.

16) AT&T then asserts on page 32 (second line from bottom):

> Thus, once petitioners replaced their pre-June 17, 1994 **plans,** their new **plans** were fully subject to the prorated shortfall obligations set forth in the tariff.

Even AT&T is stating above that it is the plans not a one year commitment period.

AT&T continues page 33 para 1:

> Alternatively, petitioners appear to argue that, as of January 1995**, "their plans had not yet been restructured", and thus were still pre-June 1994 plans that were immune from shortfall charges at the time the transfer was proposed**. Petn. at 28. The problem with this argument is that it conflates (1) the **ability to avoid prorated shortfall charges** with (2) a complete immunity from all shortfall charges under all circumstances. Section 3.3.1.Q.4 plainly did not provide a complete and immutable immunity from shortfall charges. Instead, as petitioners themselves acknowledge, this provision allowed a pre-June 1994 plan to avoid prorated shortfall charges if certain conditions were satisfied before the plan expired. Id. at 27 ("plans that were issued prior to June 17th 1994 could be discontinued ... prior to their fiscal year end to avoid [shortfall] penalties") (emphasis added); id. at 30 (petitioners' plans were "qualified for restructuring") (emphasis altered; internal quotation marks omitted). At the time of the proposed transfer, therefore, CCI's "understructure" pre-June 1994 plans were still subject to revenue commitments (i.e., "obligations") that if not met (or otherwise avoided) could result in shortfall charges. PSE was thus required to assume that obligation in writing at the time of the transfer-something it pointedly refused to do.

[2] Richard Kurth was the head of a department at corporate HQ in which AT&T referred to as its "Product House," which was in charge of development of AT&T's tariffs.

17) Petitioners explained in its initial brief that **even if the FCC agreed with AT&T that petitioners plans could only be restructured one time (not three years), petitioners would still be able to avoid shortfall infliction "well past AT&T's June 1996" shortfall liabilities infliction**.

18) The plans fiscal year was April 1994-March 1995 and AT&T knows the plans had not been restructured after June 17th 1994 and prior to the Jan 1995 traffic transfer. AT&T agrees that petitioners would have been entitled **to at least one restructure**, (petitioners believe it should be restructured under the old rules for a three year period of the plan.) However petitioners will use only one year to demonstrate:

19) The first restructure after June 17th 1994 was also **after** the Jan 1995 traffic transfer and was ordered in March 1995 for the April 1995 –March 1996 fiscal year; that coincides with AT&T's counsel Mr. Charles Fashs' letter at exhibit BB of initial brief. AT&T then fails to address the FCC Order Adopted October 12, 1995 and Released October 23, 1995 extending all restructures, (known in tariff terms as a Discontinuance without Liability), under the old rules for one year until October 1996; see exhibit DD to petitioners initial filing.

20) AT&T also **failed to address** the fact on page 5 of exhibit FF at (c) in petitioner's initial filing which states:

> AT&T will provide a credit on shortfall if the customer does not meet **first year shortfall commitment.**

This would have further extended the shortfall immune period of the FCC's Oct 1995 Ruling (Oct 1995 –Oct 1996) into (Oct 1996 –Oct 1997).

21) Therefore by AT&T own admission under petitioner's **worst case scenario** of only being able to restructure one time within the 3 year period after June 17th 1994, the petitioners plans would have been able to have restructured under the old rules and thus would **not have had to meet a fiscal year commitment until Oct 1998.**

22) Therefore AT&T violated its tariff by imposing shortfall liabilities in June 1996 upon CSTPII/Plans that were immune from S&T until Oct 1998. What AT&T has done in its comments is to not address the minimum one year restructuring capability that brings petitioners way past the June 1996 shortfall infliction because AT&T knows it losses.[3]

23) Instead AT&T **spins the shortfall permissibility issue** to an argument regarding traffic transfers. AT&T is arguing about shortfall permissibility:

> Alternatively, petitioners appear to argue that, as of January 1995, **"their plans had not yet been restructured", and thus were still pre-June 1994 plans that were immune from shortfall charges at the time the transfer was proposed**. Petn. at 28. The problem with this argument is that it conflates

All of a sudden AT&T totally bails out of the shortfall permissibility assertion on just one time restructure and does a classic AT&T "mad dash for the exit ramp spin job".

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[3] The District Court, in its non vacated May 1995 Decision made these relevant statements.
In answer to the court's questions at the hearing in this matter, Mr. Inga set forth certain methods for restructuring or refinancing by which resellers can and do escape termination and also shortfall charges through renegotiating their plans with AT&T.

Suffice it to say that, with regard to pre-June, 1994 plans, methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff.

24) AT&T recognizing that the plans would be immune for a very long time, makes then switches its argument to make a point that even though petitioner's plans would be immune from the shortfall liabilities by utilizing its restructure privilege, this does not mean that petitioners wouldn't still have a revenue commitment. AT&T is correct the revenue commitment on the plans not transferred would still be there, but as Judge Politan said when AT&T was asking for $15 million deposit, the shortfall is "**illusory";** because the plans were immune from S&T liabilities.

25) **AT&T finally concedes after 12 years** the plans were immune! The reason why petitioners brought the shortfall permissibility issue into the traffic only transfer issue is because **AT&T was bogusly utilizing its fraud provisions**, asserting that it would lose the ability to collect S&T charges. The June 17th 1994 grandfather provision is obviously **6 months prior** to the Jan 1995 traffic only transfer so AT&T knew that petitioner's plans were immune from S&T at the time of the traffic transfer and for a long time afterwards.

26) The shortfall immunity is besides the point that petitioner's fiscal year commitments had already been met at the time of the traffic only transfer as evidenced by AT&T own Revenue at Risk Report at HH of petitioners initial filing showing over $700,000 a month over commitment. Therefore AT&T should have had even less concerned that it would have been defrauded of shortfall charges. Given the fact that shortfall is by its own definition services that are never rendered by AT&T makes AT&T's permanent denial of the traffic transfer a con if there ever

was one[4]. Imagine here is AT&T holding up a transaction for the potential that years in the future it has a slight chance of getting paid for services that it never renders! Only AT&T is allowed to get away with such a scam for 12 years. A flagrant abuse of 201(b).

27) Notice AT&T own Revenue at Risk Report at HH of petitioners initial filing that petitioners were only one of a couple aggregators in the entire country over commitment, but all the others were allowed to transfer "traffic only" to PSE and Tel-Save the holders of CT-516, but petitioners were discriminated against and not allowed to do the same.

28) Imagine twelve years after the fact, AT&T now offers **zero argument** regarding the fact that the plans were immune even under AT&T's own "one time" restructure policy, which still confirms that the plans were immune well past the AT&T illegal shortfall infliction in June of 1996. So even under a one year restructure which AT&T concedes petitioners were entitled to, AT&T has zero basis for its bogus fraud allegations, and concedes the June 1996 shortfall infliction was not permissible under its own theory.

II Shortfall Waived Under Section 2.5.7 Makes AT&T An Automatic Loser of 1996 Shortfall Infliction-The Catch-22

[4] AT&T can not even argue that the shortfall commitments justify its rates due to the fact that PSE was receiving 66% discount on $4 million commitment and petitioners received 28% on approximately a $40 million commitment. In fact AT&T custom net offered 53% on a $200 a year commitment.

29) Additionally, AT&T's Dec 20th 2006 reply does not even address section 2.5.7 (Waiver of Shortfall Due to Circumstances Beyond the Customers Control) because AT&T also knows it is a sure loser there as well. AT&T is in a proverbial catch-22, pick your poison, on the section 2.5.7 issue as detailed on page 31 para 91 of petitioner's initial filing.

30) AT&T was **simultaneously** interpreting restructured plans as **new** (to classify them post June 17th 1994) but stating the restructured plans were **not new** to prohibit petitioners from enrolling AT&T own customers into petitioners CSTPII/RVPP plans without penalty. As the tariff states, if the CSTPII plans were new, then the AT&T end-users that were under LSTPII term contracts, would be able to enroll under petitioners CSTPII/RVPP plan without penalty.

31) If restructured plans are considered new then AT&T illegally prohibited petitioners from obtaining substantial traffic to meet its commitment in any event, and therefore the shortfall obligation is waived under 2.5.7 due to a circumstance beyond the customers' control. The simultaneous interpretation of restructures as being both new and old to prevent the ability to meet revenue commitments would no doubt qualify as a circumstance beyond the customers' control. It can be old or new but it can not be both! AT&T of course wanted the best of both worlds but it is impossible to classify the restructure as being both old and new at the same time!

32) There are no additional facts to find with this Catch-22 AT&T is in. If the plans were considered new when restructuring all the shortfall is waived under 2.5.7; if the restructures were a continuance of an existing plan then petitioners are immune from S&T infliction due to pre June 17th 1994 grandfathering provision. AT&T loses the June 1996 shortfall infliction either way. That's why AT&T no

longer wants the FCC to address the shortfall permissibility issues as AT&T wished the FCC would in 2003.

III The Permissibility and Infliction of Shortfall Charges Issue Is On the Table

33) AT&T asserts that the permissibility and infliction of shortfall issues are not before the FCC.

AT&T is wrong. Petitioner's briefs to the District Court covered over 100 pages of arguments relating to the shortfall issues.

34) Having been totally ignored by the District Court in separating the shortfall infliction issues from the traffic only transfer issues petitioners chose in May of 2005 to initially focus the court on the traffic transfer issue as petitioners believed that the traffic only transfer issue was more than the Court could absorb; **however that quickly changed.**

35) It is absolutely ridiculous for AT&T to state that petitioners abandoned it shortfall claims. It would be just as ridiculous for petitioners to argue that AT&T abandoned its shortfall **counter** claims that also got stayed. The FCC must remember that AT&T and petitioners were before the District Court for 2 years and the first brief was nothing compared to the avalanche that followed. Petitioners have already filed with the FCC an extensive brief showing that the shortfall issues were indeed debated between AT&T and petitioners. What was initially stated by petitioners certainly did not become reality as petitioners filed at least 5 extensive briefs with the District Court.

36) The shortfall issues got pulled into the District Court case because AT&T was claiming that it still had the availability to rely upon its fraudulent use section. Petitioners had to counter, explaining that the June 17th 1994 provision was 6 months prior to the Jan 1995 traffic only transfer. AT&T knew at the time of the traffic only transfer in Jan 1995 that petitioner's plans were immune from shortfall and termination infliction for a great time period, thus fraudulent use was a bogus AT&T claim. By the time the two years were over the District Court had seen **an avalanche of paper** on shortfall issues from both sides.

37) That is why the District Court framed its referral stating **"other open issues".** If it was just the traffic transfer issue the Court would have said just that. There were so many other issues brought to the Courts attention that it was too long to mention them all so he simply stated all other open issues that were before the DC Circuit. Judge Bassler understood that the shortfall issues were clearly before the FCC.

38) In fact before FCC counsel Mr. Bourne could even complete its sentence regarding the grandfathered June 17th 1994 plans, the DC Circuit Judge Ginsburg completed the sentence for FCC counsel:

> FCC's MR. BOURNE: Well, CCI still had the obligation to pay its shortfall charges, and there's, there are **other aspects to this that the Commission didn't rule on. I mean, for instance --**
> JUDGE GINSBURG: **Whether they were grandfathered?**
> MR. BOURNE: **Right. So it could well be that there were little or no shortfall charges. The Commission didn't rule on that point, but if there were little or no --**
> JUDGE GINSBURG: If that was the understanding with which they went into this, then the nature of the scheme was to move the obligation to a customer who, away from a customer who would be able

to shed its obligations under the grandfather provision, right? Or pardon me, if the Commission agreed that it was grandfathered under the old tariff. That's the scheme, to **move it from somebody who's got the benefit of grandfathering and can get out of its obligation that way to somebody who's got the benefit of a larger discount.**
MR. BOURNE: **That's correct.**
JUDGE GINSBURG: **Okay.**
MR. BOURNE: There's another possibility is that if the transaction were to occur **mid-year,** for instance, and a carrier had **already met its minimum usage obligations,** then there wouldn't be any issue of -- now, I don't know the answer to that, but there --
JUDGE GINSBURG: Okay, okay.
MR. BOURNE: There's another possibility is that if the transaction were to occur **mid-year,** for instance, and a carrier had **already met its minimum usage obligations,** then there wouldn't be any issue of -- now, I don't know the answer to that, but there --
JUDGE GINSBURG: Okay, okay.

39) Therefore it is quite obvious that there were **open issues** in the DC Circuit relating to AT&T's permissibility to inflict shortfall and termination charges on these plans, as well as the fact that the plans revenue commitment had already been met. Both of these were **open issues** at the DC Circuit.

40) The FCC counsel reiterated during the DC Circuit oral argument what the FCC stated in its Oct 2003 FCC Decision that the Commission **didn't rule on the pre June 17th issue; it was still an open issue.** The reason that the FCC did not rule on it in 2003 was that petitioners requested that the plans could forever be restructured. Petitioners have substantially modified its request for the FCC to act in accordance with the clear tariff language.

41) Additionally the FCC decision stated that it didn't rule on the shortfall issues because the District Court did not refer those issues to the FCC. Obviously the District Court did not refer the June 1996 shortfall issue because the **last** District

Court decision (March of 1996), was 3 months before the June 1996 shortfall infliction; therefore there was not an open issue to refer in March of 1996.

42) When the shortfall hit in June of 1996 it was the FCC that notified AT&T and petitioners that these shortfall bills will be added to Declaratory Ruling requests. During DC Circuit oral argument how was Judge Ginsburg able to complete the sentence of FCC Counsel Mr. Bourne?

> Mr. Bourne: there are **other aspects to this that the Commission didn't rule on. I mean, for instance --**
> JUDGE GINSBURG: **Whether they were grandfathered?**

43) Obviously Judge Ginsburg read the many pages in the joint appendix addressing the permissibility of shortfall, which both AT&T and petitioners asked the FCC to rule on these shortfall issues. Now that the facts have all been developed on shortfall, AT&T no longer wants the FCC to decide the shortfall issue. AT&T requested the shortfall be resolved in July 1996 and then AT&T further argued for in its 2003 public comments.

44) The District Court clearly argued the shortfall law and developed the facts:

District Court:

> In answer to the court's questions at the hearing in this matter, Mr. Inga set forth certain methods for **restructuring** or refinancing by which resellers can and do **escape termination and also shortfall charges** through renegotiating their plans with AT&T.

District Court:

> Suffice it to say that, with **regard to pre-June, 1994 plans,** methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff.

The District Court Judge Politan 1996 Decision Joint Appendix pgs 169 -170:

Decision page 19 para 1

> Commitments and shortfalls are little more than **illusory concepts** in the reseller industry—concepts which constantly undergo renegotiation and **restructuring.** The only "tangible" concern at this juncture is the service AT&T provides. The Court is satisfied that such services and their costs are protected. To the extent however that **AT&T's demand for fifteen million dollars' security is premised on the danger of shortfalls,** the Court finds that threat neither pivotal to the instant injunction nor properly substantiated by AT&T.

45) What more could Judge Politan possibly have done to get the point across? After extensive briefing and a two day trial Judge Politan he heard all he needed on shortfall permissibility.

Petitioner's immunity from shortfall combats AT&T's fraud allegations. The DC Circuit Decision shows that AT&T was arguing fraud and the way to counter that is show the fraud allegations are bogus due to the fact that the plans are immune from shortfall. The shortfall issue is an open issue in the DC Circuit.

The DC Circuit Decision pg 4:

> In addition, AT&T argued that the proposed transfer violated the tariff's "fraudulent use" provisions, as CCI almost certainly would fall short of its volume commitments once the traffic was moved to PSE's account, and AT&T had reason to believe that CCI would not have sufficient assets to pay the resulting penalties.

46) AT&T wouldn't have been able to argue such nonsense if the FCC took the proper course and trumped AT&T's bogus fraud assertion. The Pre June 17th 1994 grandfathered law came 6 months prior to the Jan 1995 traffic only transfer so AT&T knew the fraud assertion was totally bogus. The FCC let AT&T make a bogus argument to the DC Circuit because the FCC was waiting for a referral from Judge Politan whose last case ended 3 months prior to the June 1996 shortfall infliction.

AT&T Dec 20th 2006 Page 41 footnote 23:

AT&T Asserts:

> Furthermore, given that there has been no discovery in the district court on the claims in the Supplemental Complaint, it is premature to conclude that there are no fact issues with regard to the **June 1996 shortfall** allocation issue.

47) AT&T is again misleading the FCC. Extensive testimony and discovery was taken and briefing done **on the shortfall issue** in the District Court in 1995 as the pre June 17th 1994 law was obviously 6 months prior to the traffic only transfer, so it was examined in depth by Judge Politan's District Court. The District Court Decisions both clearly cover the June 17th 1994 law on shortfalls. When AT&T illegally hit the plans with its bogus shortfall, 190 bills were additionally added to the FCC's record.

FCC 2003 Decision Page 14 footnote 94:

> After receiving AT&T's bills for shortfall charges, 190 of CCI's end users sent letters to the Commission in June and early July of 1996. The Consumer Protection Branch of the Enforcement Division of the Common Carrier Bureau informed these end users that their letters would be treated as **informal comments in this declaratory ruling proceeding.**

48) Additionally, the FCC Decision clearly states that both parties addressed the June 1996 shortfall infliction issue in separate filings with the FCC that were added to the Declaratory Ruling proceedings. The FCC's 2003 Decision clearly shows that the dates of the FCC filings by AT&T and petitioners are **August 26, 1996**, and **September 23, 1996;** obviously after the **June 1996** shortfall infliction.

FCC 2003 Decision Page 4 para 7

> On July 15, 1996, the aggregators filed a petition with the Commission in which, "based on established Commission practice, policies, and precedents, the plain language of § 203 of the Communications Act of 1934, as amended, F.C.C. Rule 61.54(j), and Sections 201 and 202 of the Act," they sought declaratory rulings on four issues. **By separate cover motion**, the aggregators **also sought expedited consideration** of their petition for declaratory ruling because, they alleged, AT&T was **unlawfully billing certain charges to the aggregators' end-users**. AT&T filed Comments in Opposition on **August 26, 1996**, and Petitioners filed Reply **Comments on September 23, 1996.**

49) Again the reason why the shortfall was debated was due to AT&T's bogus fraud claims. Even though the traffic transfer issue and the shortfall issues are exclusive claims the shortfall permissibility issue is co-mingled due to AT&T's bogus fraud issues.

50) AT&T is the party that forced the shortfall issue into the traffic transfer issue because of AT&T's bogus fraud assertions. Additionally **AT&T wanted the June 1996 shortfall permissibility issue decided by the FCC as well as petitioners:**

AT&T's **1996** Joint Petition for Declaratory Ruling Page 3 para 1

> As to this issue, **which does not require any findings as to disputed facts**, the Commission should rule that shortfall charges may be imposed where, as here, post **June -17th 1994** CSTPII replacement plans are discontinued or reach an anniversary date.

AT&T's **1996** Joint Petition for Declaratory Ruling Page 14 para 2

> **Petitioners have identified an issue which is currently ripe for a declaratory ruling**; i.e., whether "**pre-June 17th, 1994** CSTPII plans**, as are involved here,** may never have shortfall charges imposed, as long as the plans are restructured prior to each one-year anniversary. "**No factual questions surround this question"**

51) AT&T didn't change its mind that it wanted a ruling on shortfall permissibility 7 years later in 2003 either:

AT&T's CORP. 2003 FURTHER REPLY COMMENTS TO FCC Page 3 para 1:

> Accordingly, the Commission should deny the Joint Petition, and should instead issue the ruling requested by AT&T in its Comments filed in 1996 that shortfall charges may be imposed where, as here, post-June 17, 1994 CSTP II replacement plans are discontinued or reach an anniversary date.

52) Petitioners are only requesting that the grandfathering be allowed for the remaining part of the plans 3 year commitment after June 17th 1994 as the tariff says: "CSTPII Plans in effect on or prior to June 17th, 1994" are not subject to such shortfall charges. Plans are three years so they are still in effect. This would only make sense because the FCC's Oct 1995 Order extended the pre June 17th 1994 provision through Oct 1996; as well as grandfathered all section 2.1.8 Transfers of Service orders. (See exhibit DD in initial filing)

53) If the FCC uses AT&T's theory that it is the 1 time restructure and not the 3 year plan then by June 17th 1995 there would be no more grandfathered plans to extend. That obviously can't be true because the start of the FCC's Oct 1995 grandfather extension is 4 months after June 17th 1995 date when according to AT&T's bogus theory all the June 17th 1994 plans are no longer grandfathered, because AT&T states its only one year!

54) The FCC's Oct 1995 Order, clearly states that AT&T "committed to continue" the June 17th 1994 provision (i.e., the tariffs discontinuance without liability

provision) **it didn't stop it, and then restart it.** Plans are three years period! Petitioner's position makes a whole lot more sense and any ambiguity is construed against AT&T.

55) AT&T was correct that there are no disputed facts. AT&T simply knows it losses and does not want the FCC to rule. There is simply no other reason. AT&T was aware at the time of the traffic only transfer that the plans were still pre June17th 1994 and had not been restructured after June 17th 1994 nor prior to the Jan 1995 traffic only transfer.

56) Additionally when AT&T wrote its **1996** Joint petition to the FCC it knew that it had entered into the Oct 1995 FCC Order grandfathering all aggregators from shortfall and termination liabilities through Oct 1996, but that didn't stop the flagrant misrepresentations to all courts either. AT&T having known petitioners restructuring dates and having entered into the FCC's Oct 1995 Order (exhibit DD in petitioner's initial filing) was knowingly misrepresenting itself to the FCC and all Courts that petitioner's plans had not been immune from having shortfall and termination liabilities inflicted against these plans. Judge Politan's statement that AT&T is looking to put petitioners out of business was right on target, as AT&T not only put petitioners out of business but all other aggregators.

57) Many letters were sent to AT&T months before the June 1996 shortfall infliction advising AT&T that the plans were still pre June 17th 1994 grandfathered. Despite AT&T knowing the plans were immune AT&T continued its fraud by

involving the end-users, illegally using the US Postal System to deliver what AT&T knew to be fraudulent bills.

58) The FCC noted….

> FCC 2003 Decision Page 14 Footnote 94
> Accordingly, we surmise that AT&T made no further attempt to bill or collect these charges from CCI's end-users and therefore conclude that the propriety of imposing shortfall charges on CCI's end-users is a moot issue.

The propriety that the FCC addresses in Footnote 94 must be evaluated from not only the traffic only transfer stand point but must now be evaluated from the June 1996 shortfall infliction stand point. See exhibit NN a sample AT&T bill of an end-user in June 1996. The June 1996 infliction was not permissible plus it was done in an illegal fashion.

59) Putting charges on the end-users bills whereby a $300 user gets a bill for about $4,000 was analogous to 4,000 bullets to the chest; petitioners were dead! AT&T bogusly blamed the petitioners and all petitioner goodwill was lost. AT&T immediately stopped all payments to petitioners and effectively ended the business overnight. Pulling the charges off the bill was like pulling the 4,000 bullets out of the dead body. A Judge will go no softer on the shooter because they buried the victim without the bullets nor should the FCC. Therefore petitioners respectfully ask that the FCC evaluate the permissibility and illegal method of applying the June 1996 shortfall charges.

60) The bottom line is AT&T wanted the FCC **"to issue a ruling"** on shortfall and stated **there were no disputed facts**. Both parties additionally briefed the FCC on the shortfall charges. In 1996 and 2003 AT&T **encouraged the FCC to rule on the pre June 17th 1994 shortfall issue**; how in the world does AT&T now state in 2007, not to rule when AT&T has already taken the position to the FCC (1996 & 2003) and to Judge Bassler in 2006 that there were no disputed facts? **Furthermore, AT&T also offers no disputed facts, because there aren't any.**

61) This time around the FCC has AT&T admitting the plans were still classified as pre June 17th 1994 issued at the time of the traffic only transfer, the July 3rd 1996 Charles Fash letter (exhibit BB in petitioners initial filing [5]) confirms that the plans had not been restructured, and the FCC has its own Oct 1995 Order, which was not presented in 2003 by petitioners. Petitioners found that order by doing a google search on "AT&T Grandfathers" and found it. Why mention this? Because in the FCC 1995 Order it states that AT&T was suppose to send the notification of the FCC Order "receipt requested" to each aggregator in 1995 and of course AT&T never did.

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[5] AT&T's Charles Fash July 3rd 1996:

Indeed the relevant period for calculation of the shortfall charges in issue did not expire until **March 31st 1996**, and the charges were then billed on the June 1, 1996 bills. AT&T's claim for payment of these charges obviously could not have been the subject of litigation until both of these events had occurred.
Petitioners were significantly involved in the June 17th 1994 ruling as a protestor along with many other aggregators. Petitioners deliberately restructured all its CSTPII plans to have fiscal year dates starting just prior to June 1994 to maximize what it believed, at the time, to be at least three years shortfall and termination immunity or for the life of the RVPP ID as per AT&T staff.

62) AT&T knows it violated the tariff by inflicting shortfall charges against petitioners. That is why it is arguing now, so vehemently not to decide the issue. Why is it that AT&T is not interested in pursuing its 1997 counter claim on the 1996 shortfall issue? Because it's a loser too!

63) The FCC did not have the following in 2003:

AT&T's May 22nd 2006 brief to the District Court stated that all the issues were already before the FCC. The reason why AT&T was telling the truth to the District Court was because AT&T did not want the stay lifted; but now that AT&T is before the FCC AT&T again changes its position. Petitioners have seen AT&T do the same maneuver to each venue. When before the Court argue that all the issues are interpretative and must go to the FCC. When before the FCC, argue that all the same exact issues are all disputed facts. The FCC and the Courts have allowed AT&T to pull this nonsense off for 12 years.

64) Here is AT&T's position to the District Court:

> Plaintiffs made the same arguments to the FCC that they are now raising in this Court. Their **prior submissions to the agency** confirm that the issues they ask this Court to decide **are all encompassed within this Court's primary jurisdictional referral.**

Now that we are before the FCC, no longer is this AT&T's position. The AT&T scam just continues.

The FCC did not have this in 2003 either:

AT&T's position before the District Court was that all issues were interpretive and that there no disputed facts. AT&T counsel Mr Guerra argued to the District Court:

> Mr. Guerra: First of all, firstly, <u>everything counsel said was in fact a question of **interpretation.**</u> District Court Transcript pg. 20 line 9.

65) There are no disputed facts on the shortfall issues. Petitioners' worst case scenario shows that even if the FCC decides that petitioners were only entitled to restructure one time under the pre June 17th 1994 rules, and then uses the FCC Oct 1995 Order, and 1st year credits rule, there is no shortfall possibility until way past June of 1996. AT&T was therefore in violation in June 1996, and AT&T's bogus fraudulent use nonsense in Jan 1995 was bogus even if it met the 15 day statute of limitations—which it didn't.

66) Regarding the illegal remedy issue what additional fact finding can the District Court possibly come up with as it is crystal clear, based upon the 190 end-users bills that the FCC already has which shows AT&T violated its tariff. The bills all show shortfall charges inflicted well above the tariffed remedy of only permitting AT&T to reduce the discount. The non disputed facts are the bills and the tariff law is at 3.3.1.Q bullet 10. These are the undisputed facts ---period! The FCC must rule that this is an illegal remedy.

67) AT&T is constrained by its tariff and it simply inflicted the bogus shortfall to blame petitioners and bring the accounts back to AT&T. Clearly AT&T acted outside of its tariff:

FCC 2003 Decision Page 12 para 17:

> Thus, the "filed tariff doctrine" requires carriers, as well as their customers, to abide by the terms of the tariff **<u>and precludes carriers from acting outside it</u>**

Given the fact that AT&T did not adhere to its restructure (Discontinuance without Liability) June 17th 1994 grandfather provision and used an illegal remedy[6] in assessing shortfall it is clear that there is no additional fact-finding on these issues necessary, as the FCC sated itself:

FCC 2003 Decision Page 13 Footnote 87

> Given our conclusion that AT&T violated section 203 of the Act, it is unclear what additional fact-finding on these issues is necessary.

That's Right!!! There are no additional facts to find.

68) AT&T would like shortfall issues to simply go away, but this time the FCC must address these issue that affects both the traffic transfer issue and the June 1996 issue.

The FCC's adjudication of shortfall permissibility issue is self defined as it relates to June 1996 infliction.

69) FCC 2003 decision at Page 11 para 15 & Page 14 para 20

> The Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to "terminate a controversy or remove uncertainty.

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[6] FCC 2003 Decision Page 13 para 19
Subsection 203(c) forbids a carrier from employing or enforcing any classifications, regulations, or practices affecting its charges unless they are "specified" in the tariff and makes it unlawful for a carrier to deviate, in the rendition of tariffed services, from the charges, regulations, and practices set out in its filed tariff. [FCC Footnote 91] We agree that, when AT&T availed itself of a remedy not "specified" under its tariff, it violated section 203 of the Act. [FCC FOOTNOTE 92]
FOOTNOTE 91:
47 U.S.C. § 203(c); *see Central Office Telephone*, 524 U.S. 214
FOOTNOTE 92
47 U.S.C. § 203(c).

Given the fact that it is now obvious that the shortfall should not have been applied, the District Court will want to know how long the CSTPII plans would be able to restructure under the old rules. This is an uncertainty that the District Court would need to not only establish liability as to June 1996, but assess damages on the traffic only transfer. Judge Bassler would not have stated that there are other open issues if he did not want these issues resolved. No Judge wouldn't want all the issues resolved; additionally the FCC General Counsel advised petitioners before the Judge even issued the referral order that petitioners are entitled to have these issued resolved, especially after being scammed by AT&T for 12 years.

IV The Record Is Loaded With Evidence Clearly Showing that the Transferors Revenue Commitments and its Potential for Shortfall and Termination Stay With the Transferor's Plan

70) Here are many cites from the record, (there are dozens more), from AT&T when AT&T was focused on denying the fact that 2.1.8 allowed traffic only transfers.[7]

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[7] District Court Judge Politan March 1996 Decision page 5 para. 1
Additionally, AT&T contested plaintiffs' allegation that any tariff transmittal determined by the FCC could only have prospective effect --**contending that the tariffs in question had never permitted fractionalization of plans and service** and that the outcome of the Tariff Transmittal No. 9229 would establish that conclusion without question.

District Court Judge Politan March 1996 Decision page 6 Last line.
As such, regardless of the intent, if any, of AT&T's post-May 19, 1995 conduct, the Court must now revisit its earlier determination and consider whether interim relief may be granted pending a resolution by the FCC of **the question whether service and plans may be fractionalized by aggregators.**

AT&T did not realize at the time that the focus of the case would eventually be on which obligations transferred on a traffic only transfers:

District Court's 1995 non vacated Decision on page 4 footnote 4; originally page 58 of Joint Appendix to the DC Circuit. HERE AS EXHIBIT: **Reply A**: (Separately uploaded to Server)

> *Any* bad debt or unpaid bills created by an aggregator's end users will be deducted from **that aggregator's RVPP** discount return by AT&T before remission of the CSTP II/RVPP return.

71) The District Court's 1995 non vacated Decision on page 5 footnote 5; originally page 59 of Joint Appendix to the DC Circuit. HERE AS EXHIBIT: **Reply A:** (Separately uploaded this exhibit to the FCC Server)

> as in the plaintiffs' case**, AT&T deducts from the RVPP discount**/rebate remitted to PSE any bad debt or unpaid bills accrued by its end users.

In the above cites, Judge Politan's decision was correct that the bad debt is deducted from the aggregator RVPP pool that had the accounts on its plan. AT&T's ridiculous theory states that all obligations must transfer on a "traffic only" transfer and therefore the transferee would be responsible for bad debt on the accounts **that did not get transferred** from a transferor! AT&T's bogus theory of how 2.1.8 operates in the marketplace would make PSE responsible for bad debt on end-user accounts that it never received from CCI! Imagine AT&T actually thinking that

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Also see exhibit I in petitioners initial filing which is a fax from AT&T processing manager Joyce Suek that advised petitioner that AT&T no longer did **partial** TSA's; i.e. traffic only transfers, it had to be for all the traffic and entire plan. Notice there was no option to transfer the revenue commitment and hence S&T obligations and have CCI/Inga keep the plan. Therefore when the DC Circuit understood that 2.1.8 allowed traffic only transfers the obligations question was by default answered.

this bogus theory is the way its tariff works in the business marketplace! Petitioners can't wait to see AT&T counsel tell the DC Circuit panel this nonsense with a straight face.

72) The District Court's 1995 non vacated Decision on page 5 para 2; originally page 59 of Joint Appendix to the DC Circuit. HERE AS EXHIBIT: **Reply A:** (The Decision is separately uploaded to FCC Server)

> As customers of record, the aggregators are lawfully responsible for any deficiency in usage. Thus they aggregate **their commitment** out to small business which need that service but cannot obtain the best deal directly with the common carrier because of their low volume of service usage**. If the end users fail to pay their bills or if there is any shortfall in usage under an aggregator's plan, "that aggregator" is liable to AT&T for the deficiency**. For instance, under the CSTP II agreements, the discount rates available to plaintiffs are contingent upon high annual usage commitments. If such commitments are not met, **the aggregator is obligated to pay "shortfall" charges**, which amount to the deficiency in usage over the contract term. Shortfall charges are retroactively imposed. If a plan is prematurely terminated, **the aggregator is liable for a prospective "termination" charge** for the prospective deficiency under the agreement.

In the above cite the District Court clearly recognized that the aggregator is responsible for its plans commitments. If the plan does not transfer the plan commitment can not transfer.

73) District Court's 1995 non vacated Decision on page 9 para 2; originally page 64 of Joint Appendix to the DC Circuit. HERE AS EXHIBIT: **Reply A:** (The Decision is separately uploaded to FCC Server)

> Moreover, plaintiffs allege that AT&T has further violated the Act by failing to comply with the plain terms of its own tariff, **namely section 2.1.8,** which makes no reference to any deposit requirement and contains no cross-reference to that section of the tariff which allows deposit demands, namely section 2.5.8. Additionally, plaintiffs allege that AT&T's danger of losing on the Inga companies' commitments **was less after the Inga companies/CCI transfer than before.** For instance, plaintiffs point out that under the **tariff rule of transfer**: (i) AT&T had security in the fact that it. AT&T, bills the end users directly; (ii) AT&T could pursue CCI for the going-forward non-payments arising from the transferred plans, while having recourse to the Inga' companies for all pre-transfer non-payments; and [iii] that **AT&T could look to CCI and/or the Inga companies for shortfalls in the minimum annual commitment levels under the plans.**

Above the District Court expressly states that it is using **section 2.1.8 to determine allocation of obligations.** The fact that the decision states that both CCI as well as the Inga Companies would remain liable for shortfalls on its plans indicates the Court understood the joint and several liability provision of section 2.1.8., as CCI would be primarily obligated for the **actual shortfall obligations** but AT&T still would be able to pursue the Inga Companies for shortfall as well, since the Inga Companies **remained jointly and severally obligated** for shortfall that did not transfer. The FCC accurately referenced this decision that used 2.1.8 in its 2003 FCC Decision to counter AT&T's bogus fraudulent use claims.

74) The District Court's 1995 non vacated Decision on page 10 para 2; originally page 65 of Joint Appendix to the DC Circuit. HERE AS EXHIBIT:

Reply A: (The Decision is separately uploaded to FCC Server)

> On January 13, 1995, PSE and CCI jointly executed and submitted written orders to AT&T to transfer the 800 traffic under the plans CCI had obtained from the Inga companies to the credit of PSE. Only the traffic was to be transferred, not the plans themselves. In this way, **CCI would maintain control over the plans** while at the same time benefiting from the much larger discounts enjoyed by PSE under KT-516. AT&T refused to accept this second transfer on the ground that

> CCI was not the customer of record on the plans at issue, and thus could not transfer the traffic under those plans to PSE. **AT&T was further troubled** by the fact that if **only the traffic on the plans and not the plans themselves were transferred to PSE**, the liability for **shortfall and termination charges attendant thereto would then be vested in CCI**: an empty shell in AT&T's view.

The above cite again confirms that CCI would maintain control of the plan and the shortfall and termination obligations attendant thereto would continue to be vested in CCI after the traffic transfer to PSE. Judge Politan was accurately recounting AT&T's position as he states: "AT&T was further troubled." AT&T is judicially estopped from changing its position.

75) The District Court's 1995 non vacated Decision on page 11 para 1; originally page 66 of Joint Appendix to the DC Circuit. HERE AS EXHIBIT: **Reply A** (The Decision is separately uploaded to FCC Server)

> Suffice it to say that, with **regard to pre-June, 1994 plans,** methods exist for defraying or erasing liability **on one plan** by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff.

In the above cite, Judge Politan's decision accurately understands that the plan commitments that remain can be restructured under the June 17th 1994 grandfathering provision.

76) The District Court's 1995 non vacated Decision on page 12 line 2; originally page 67 of Joint Appendix to the DC Circuit. HERE AS EXHIBIT: **Reply A**

> **AT&T replies** to that assertion by arguing that since only the traffic on the plans was passed to PSE, and "**not the plans themselves with their**

> attendant liabilities," PSE's standing and credit-worthiness was "irrelevant" to the potential for shortfall and termination liability. Absent an acceptance by PSE of the Inga companies' commitments on the plans, AT&T would not authorize the CCI/PSE transfer.

In the above cite Judge Politan restates AT&T's own position that since CCI/Inga's plan and its attendant obligations would not transfer, PSE's credit worthiness is irrelevant because AT&T can not pursue PSE for the S&T obligations on the plans that are not transferring. Simply, S&T obligations do not transfer on traffic only transfers as per AT&T's position to the District Court. The non vacated decision is the Law of the Case as the FCC agreed with the District Courts use of section 2.1.8 to interpret and determine the allocation of obligations.

77) AT&T's 1996 brief to the FCC page 5 line 7:

> The proposed transfer would have transferred the entire revenue stream to PSE without the corresponding obligations to pay any shortfall and termination charges under the CSTPII plans.

The above statement is correct that the S&T obligations have to stay with the corresponding plan but it is not correct in saying that the entire revenue stream was transferred. First of all the revenue continues to go to petitioners and is quadrupled and secondly, all the traffic was not being transferred so as to comply with section 5 of the tariff: See exhibit CC to petitioner's initial filing: Discontinuance of CSTPII " All Of Service" must be removed from plan. Petitioners purposely left accounts on the plans because petitioners thoroughly understood the tariff.

78) AT&T's 1996 brief to the FCC page 6 para 2 quoting and agreeing with the non vacated May 1995 Judge Politan Decision which was quoting AT&T regarding S&T obligations under the tariff would not transfer on petitioners traffic only transfer:

> **AT&T believes** that these transfers are an effort by the principal of the Inga companies to evade annual commitments to AT&T in such manner as to escape liability for any **shortfall and termination charges which might otherwise arise on those plans.** [FOOTNOTE WAS HERE]
> FOOTNOTE STATED: May 19, 1995 Order at 12, n.9.

79) AT&T's 1996 brief to the FCC page 7 footnote 6

> AT&T Transmittal No. 8179 **would have** made explicit that an existing customer could not transfer even "substantially all 800 numbers on an existing plan" under circumstances where it would not be able to meet volume commitments unless the new customer agreed to assume "**all of the existing customer's obligations"**.

In the above statement AT&T is admitting that all the obligations which here are referring to shortfall and termination obligations would transfer because a **PLAN** transfer would occur under 8179 not a traffic only transfer. Tr.8179 was rejected by the FCC so the status quo remained that S&T obligations do not transfer on traffic only transfers.

80) AT&T's 1996 brief to the FCC page 7 footnote 6:

> Under the terms of CCI's requested transfer, CCI would have remained the customer of record for the CSTPII Plans; but by transferring its revenue-producing accounts, CCI could render itself an assetless shell, unable to either fulfill **its revenue commitments** to AT&T **or pay its shortfall or termination charges.**

AT&T is again confirming that under the tariff the revenue commitment and its associated S&T obligations stay with the customer's plan. The shortfall and

termination obligations change all the time as it is **the difference between the revenue commitment and the account traffic that was left on the CSTPII plans**. When AT&T states it wants shortfall and terminations obligations transferred that in a misnomer. What AT&T is really saying is that wants the transferor's (CCI/Inga) revenue commitment to transfer with all the traffic as per Tr. 8179. What AT&T is essentially saying is that it wanted the transferor to do a **plan transfer**; not to do a traffic only transfer. The DC Circuit said 2.1.8 allows both traffic only transfers and plan transfers.[8] AT&T's ability to collect shortfall and termination liability from a transferor may occur on a "**non"** pre June 17th 1994 grandfathered plan would still be available for AT&T to pursue as to the CSTPII transferors' plan. Since AT&T is not allowed to charge aggregators end-users shortfall charges, AT&T's argument can not be that AT&T needs to have the accounts on the transferors CSTPII plan.

81) To follow is AT&T's position that the only way that AT&T was allowing a "traffic only" transfer is that the transferor (CCI/Inga) would have to transfer the plan; thus basically stating that 2.1.8 does not allow traffic only transfers:

AT&T REPLY brief to the Third Circuit in 1996: Page 2 paragraph 2:

> The overriding fact is that plaintiffs had a clear right under AT&T's tariffs to transfer all the customer locations on the CCI/Inga plans to PSE if they also transferred all the obligations under the **plans** to PSE. And AT&T could not and would not have had any objection to the CCI-PSE transaction if it had been structured in this way. **Following such a**

[8] AT&T's position is basically the same that Judge Roberts stated was nonsensical. JUDGE ROBERTS: So your reading is that the whole plan may be transferred provided that the whole plan is transferred, right? I mean, it's kind of a nonsensical reading, isn't it?

> **transfer**, PSE would have had the right to discontinue service **under the plans** and to put all the traffic on Contract Tariff 516

In the above statement AT&T says PSE would get CCI/Inga plans and then AT&T would allow the traffic to transfer; but that's not a traffic only transfer between two different AT&T customers! Also AT&T is again saying that all the obligations (including S&T obligations) would transfer only on a plan transfer. The DC Circuit found this to be nonsense.

Here is another that shows the allocation of obligations:

82) District Court March 1996 Decision page 17 para 1. Here as Exhibit Reply B. (The Decision is separately uploaded to FCC Server)

> Thirdly, AT&T has little or no danger of being harmed should the sought-for relief be granted. Its economic risk, if any, would arguably be covered by an anticipated excess over commitment under Contract No. 516, **[FOOTNOTED HERE]** and/or by its increase in revenue by dint of acquiring plaintiffs' customers as they are siphoned into Contract No. 516 by alternative avenues. Indeed the Court notes that the services provided by AT&T are billed directly to the end user who in turn remits payment directly to AT&T. The instant injunction does not change that, nor does it increase the risk that the end user shall not pay. Other interested parties --among them, end users themselves -- face no threat of harm should the relief sought be granted
> **[FOOTNOTE FROM ABOVE]**
> As previously referenced, **AT&T's counsel represented** that AT&T has initiated suit against PSE for shortfalls. In analyzing the instant motion, however, and in light of the fact that that suit was for the first time referenced orally at the hearing on this motion, the Court is not deterred by such litigation. **Indeed, AT&T's own counsel focused the issue by indicating that the tariffed obligations involved herein "are all tariffed obligations, for which "CCI, not PSE" would be obligated.**

AT&T was trying to get out of the case by stating that PSE was having shortfall problems on its own CT-516. In the above quote it is important that AT&T's own

counsel stated that **PSE would not be obligated for CCI's S&T obligations, because CCI maintains the plans commitments.**

83) AT&T brief in 1996 to Third Circuit page 8:

> Under this second proposed transfer, "**PSE would not assume" Inga's and CCI's shortfall or termination liabilities.** As the District Court noted, "[only the traffic was to be transferred, not the plans themselves" with all of the **plans' concomitant obligations**. Id. at 10 (AA 1037).

The above cite again shows that AT&T in 1996, before AT&T knew that it needed to change its post FCC Decision con on obligations actually explained how 2.1.8 worked.

84) AT&T counsel Fred Whitmere's letter of February 6th 1995.

> Mr. Inga's efforts to transfer these end users and **leave the plans intact with their commitments**, …..AT&T will seek to enforce its rights **in the event shortfall and termination charges** become due under the tariff and will hold Mr. Inga personally liable for his conduct intended to deprive AT&T of its tariff charges. (See Exhibit X to petitioners initial filing)

The above is another accurate statement on obligations allocation before AT&T's necessity to con everyone on allocation of 2.1.8's obligations.

85) AT&T brief in 1996 to Third Circuit page 9 para 1:

> As the District Court put it in its initial order in this case, "[w]ithout the revenue generated by the traffic under the plans, CCI would have no income and no means of backing **the responsibilities it maintained after the CCI/PSE transfer**." 1995 Order at 10

86) AT&T brief in 1996 to Third Circuit Page 10 Para 3:

> purpose and the effect of "avoid[ing] the payment, in whole or in part, of tariff" charges": i.e., shortfall and termination charges that would "likely accrue" on the **nine plans.** The proposed transfer would have transferred the entire revenue stream from the traffic on the plans without **also transferring the corresponding obligations to pay shortfall and termination charges**. See Meade 2d Supp. Cert. ¶ 6 (AA 1266).

87) AT&T brief in 1996 to Third Circuit Page 12 footnote 5:

> FCC Tariff Transmittal 8179 would have made explicit that an existing customer could not transfer even "substantially all 800 numbers on an **existing plan"** under circumstances **where it would not be able to meet volume or term commitments unless the new customer agreed to assume all of the existing customer's obligations**. See Meade 2d Supp. Cert. ¶ 7 (AA 1267).
> That tariff transmittal would have foreclosed any request for injunctive relief in this case if it had taken effect by its terms, and would have raised issues similar to those presented by plaintiffs' complaint if it had taken effect prospectively. As noted below, however, AT&T, at the FCC's request, thereafter withdrew the transmittal and substituted a new transmittal which would "achieve AT&T's specific purpose" in a different way. Id. ¶¶ 10-16 (AA 1268-70).

In the above statement AT&T is admitting the tariff is not explicit and therefore AT&T losses anyway. However AT&T is fabricating that it was implicit that 2.1.8 allowed AT&T to mandate that a plan transfer when there was an order for a substantial percentage of the accounts transferred.[9]

88) The following quote is important because AT&T associates the transaction ***proposed*** to AT&T **with AT&T's tariff.** AT&T had some nonsense in its Dec 20th 2006 brief that stated that all the concessions that its counsels made about S&T

[9] It has never been AT&T's position that petitioners simply moved too many accounts. AT&T simply stated that 2.1.8 did not allow the traffic only transfer. AT&T never came back to petitioners and said it will allow a certain percentage. There was no negotiation. Petitioners never had the opportunity to say:"Ok how much is too much?" Nor should they have had to. AT&T just refused it.

obligations staying on the CSTPII plans were based upon petitioner's *proposal.* AT&T was bogusly telling the FCC that the attempted traffic only transfer was just a *"proposal"* and the FCC and AT&T's counsel were not evaluating it based upon the tariff. Below we see AT&T taking the position that its tariff also acknowledged that S&T obligations (revenue volume commitments) stay with transferor (CCI/Inga):

AT&T brief in 1996 to Third Circuit Page 29 line 3

> Therefore, **AT&T's tariff provisions** must, under settled rules of equity, be read to permit AT&T not to render performance (i.e**., transfer the traffic**) before receiving adequate security that **plaintiffs** will themselves render their **required performance (i.e., fulfill their volume commitments and pay all required shortfall charges).**

89) The S&T commitment stays with transferor:

AT&T's brief in 1996 to Third Circuit Page 28 para 1:

> As an AT&T employee testified, under CCI's requested location transfer, CCI would have nominally remained the customer of record for the CSTP II's. But by transferring its revenue-producing accounts, **CCI** would apparently have rendered itself an asset less shell, unable either to fulfill **its** commitment or to pay **its** shortfall or termination charges.

As we see above in **1996** [prior to the 2003 FCC decision when AT&T had to change its obligations position], AT&T clearly identified the obligation allocation, because the AT&T scam back then was on "how the traffic could transfer", not which obligations transfer.

90) The following shows AT&T acknowledging that the account obligations on those accounts that transferred went to PSE. AT&T then argues that it also wants the S&T obligations to go too because it understood how 2.1.8 worked. AT&T notes that the plans which are not transferring have the corresponding revenue commitments/shortfall and termination obligations:

AT&T brief in 1996 to Third Circuit Page 32 para 2:

> The court also incorrectly concluded that "AT&T has little or no danger of being harmed should the sought-for relief be granted." March 5. 1996 Order at 17 (AA 1389). CCI, the company **which now has the obligation to pay AT&T for any shortfall or termination charges for the nine plans**, has no apparent assets, no credit history of record with AT&T or otherwise, and no apparent means of meeting its obligations outside of its revenue stream generated by the traffic on its CSTP II plans. See Williams Cert. ¶ 21-24 (AA 641-42). The District Court's injunction would transfer CCI's only means of repaying its obligations to AT&T --**the revenue stream from the traffic on its CSTP plans -- without also transferring the corresponding obligations to pay shortfall and termination charges.** See Meade 2d Supp. Cert. ¶ 6 (AA 1266).

91) To follow Judge Politan acknowledges the account obligations on the traffic that was selected for transfer while on PSE's plan after the injunction would be paid to AT&T but the S&T obligations stay with CCI/Inga. AT&T has fabricated some nonsense that PSE was not assuming any obligations. AT&T wasn't taking such a bogus position prior to the FCC 2003 Decision.

District Court March 1996 Decision page 19 line 2. **Here as Exhibit Reply B:**

(The Decision is separately uploaded to FCC Server)

> The Court recognizes that all of the services provided by AT&T under the plans at issue are billed directly to the end user by AT&T itself. End users pay AT&T, not plaintiffs. **As such, any services provided**

> **pursuant to this injunction shall be no more likely to go unpaid than if the injunction never issued**. With regard to AT&T's projections as to the shortfalls it anticipates will result from this injunction, the Court is un-persuaded that shortfalls are a real concern vis-a-vis the security issue.

92) To follow AT&T makes the **distinction** between a plan transfer, as in the initial Inga to CCI plan transfer, and then compares that to the second "traffic only" transfer between CCI and PSE, noting that Shortfall does not transfer:

AT&T REPLY brief to the Third Circuit: Page 4 paragraph 3:

> Ironically, the CCI Br. (at 32-34 & 36-38) relies on the District Court's finding that the earlier transfer of the entire plan from the Inga Companies to CCI did not threaten evasion of shortfall liabilities. See May 19, 1995 Order-at 22-24 (AA 1049-51). **But that is because the shortfall liabilities there followed the traffic,** as **it would not** in the proposed transfer from **CCI to PSE at issue in this appeal**.

93) To follow is an interesting AT&T misrepresentation, because AT&T actually cites the correct tariff law that plan commitments transfer on a plan transfer; however AT&T misrepresents the CCI to PSE traffic only transfer as if it transferred **all the plan's traffic**, which it did not:

AT&T REPLY brief to the Third Circuit: Page 17 para 1:

> First, the threshold question is whether a transfer of "**all a plan's traffic" without its liabilities** is by the Tariffs Transfer Provision (Section 2.1.8), and as AT&T's opening brief explains the answer is that the tariff allows transfers only if the "new customer" (PSE) assumes "all" of the **old customer's (here, CCI's) obligations**, which obviously **include shortfall and termination commitments** when "**all the plan's traffic"** is transferred.

In reference to this misrepresentation the FCC can see exhibit F in petitioner's initial brief pages 4-13 shows that 18 accounts were left on the plans. Also see tariff exhibit CC in petitioner's initial brief showing that there is no discontinuation unless ALL SERVICE is removed. Here ALL SERVICE was not removed. Petitioners were the leading aggregators and understood the tariff.

94) To follow is another AT&T spin job. Faced with empirical evidence provided by CCI showing that when CCI did previous traffic only transfers that just the account obligations transferred and the S&T obligations stayed behind, AT&T did a spin job and compared what a plan transfer would have required instead of petitioners traffic only transfer. In fact AT&T counsel states that CCI's position on traffic only transfers is **self-evident** under the tariff. Watch how AT&T counsel deceptively mixes those apples (traffic transfers) with those oranges (plan transfers) on this one:

AT&T REPLY brief to the Third Circuit 1996: Page 17 para 2:

> CCI notes that a transfer of service can apply either to individual end user locations or to entire plans. See CCI Br. at 31-32 & n.13. CCI then, incongruously, seeks to defend the District Court by citing "**record evidence"** that addressed transfers of (**not entire plan's liabilities**), and showed that the only "obligation" transferred to the "new customer" in **that event** is the unpaid liability associated with the individual end user location that is transferred. **But that is self-evident under the tariff**. By contrast, when "**all" the plan's traffic and locations are being transferred** to a new customer and when the "plan" would then exist only as an "**empty shell"**, then the "new customer" **would not** be assuming "all" the associated "obligations" unless it assumed the "**existing customer's" shortfall and termination commitments**. **Otherwise, all the plan's traffic is separated from liability,** and AT&T loses control over traffic that effectively requires the liabilities under the plan.

Again AT&T above is arguing that all traffic was transferred which obviously the facts show all traffic was not transferred. This is why AT&T did even address tariff exhibit CC in petitioner's initial filing.

95) The following is AT&T's position to the FCC in AT&T's 2003 comments (exhibit Z to petitioner's initial filing) that since petitioners did not do a plan transfer it would not be jointly and severally liable for the traffic that it transferred to PSE. The actual liability to meet revenue commitments and hence S&T obligations would stay with transferors (CCI/Inga). AT&T's position leading up to the FCC 2003 decision was absolutely correct. The FCC will also see how this quote on "joint and several liability under 2.1.8" directly conflicts with AT&T's pathetic attempt to cover up for all its counsel.

> Moreover, as AT&T's customers for all of the locations and all of the traffic generated under the tariffed plans, in terms of the ***transfer*** **of such accounts** the Petitioners would, "**but for"** the attempt to bifurcate the traffic from the **underlying plans**, **remain jointly and severally liable** with the new customer for all obligations existent at the time of the transfer.

V AT&T Tries to Repair the Avalanche of Evidence Against It

96) Obviously the record is absolutely loaded with concessions from many AT&T's counsels stating that the revenue commitments and shortfall and termination obligations remain with the non-transferred CCI/Inga plans. Why did AT&T's counsel give away the answers that favor petitioners? Because the issue of which obligations transfer on traffic only transfers was

not the initial focus; the initial focus was on whether 2.1.8 allowed traffic only transfers. Therefore AT&T didn't know back then (prior to the FCC 2003 Decision) that it was **inadvertently hanging itself** on the obligations allocation question.

97) The question referred that Judge Politan initially referred was:

> whether section 2.1.8 [of AT&T's Tariff FCC No. 2] permits an aggregator to **transfer traffic under a [tariffed] plan without transferring the plan** itself in the same transaction.

The focus was on the methodology of account movement, not on allocation of obligations. What happened was that AT&T's counsels, in an attempt to argue whether the tariff permits an aggregator to "transfer traffic under a [tariffed] plan without transferring the plan" **spilled the beans!**

98) Additionally, AT&T's fraudulent use defense also put AT&T in a real bind because the only way to argue that it was going to be deprived of the potential of S&T liabilities on CCI/Inga's plans was to obviously admit that S&T obligations do not transfer on traffic only transfers.

Faced with dozens of AT&T concessions AT&T makes a feeble attempt to cover-up for all of its counsel's concessions.

AT&T in an attempt to clean up its counsel's concessions AT&T asserts on page 29 line 3:

> Moreover, as AT&T has explained, a valid or permissible traffic transfer under § 2.1.8 would not have extinguished the transferor's liabilities; rather, the **joint and several liability requirement** meant that both the transferor and transferee were responsible for the transferor's obligations. **Accordingly, any AT&T statement that a transferor remained liable for such obligations** after the transfer was in no sense a "concession" that shortfall and termination obligations did not transfer.

99) There are **major wholes** in AT&T's attempt to **simultaneously** repair **all** counsel's concessions. (A) The quotes were made when AT&T was simultaneously arguing that the transferor (CCI) was not jointly and severally liable as petitioners have evidenced at exhibit Z to petitioner's initial filing and the quote is here at paragraph 95 above. CCI maintained the actual obligations. Joint and several liability only occur on plan transfers as per 2.1.8E exhibit AA.

(B) AT&T claims that all its counsels were referring to joint and several liability obligations remaining with transferors plan, not the actual controllable S&T obligations. The major problem with this "cover up" is that when AT&T argues that the transferor (CCI) had joint and several liability for S&T obligations that **by definition would mean that CCI transferred the actual S&T obligations to PSE!!!** However, the non disputed fact is that AT&T has always maintained that CCI did **not** transfer the actual shortfall and termination obligations, therefore **AT&T's own cover-up defense conflicts with its position!!!** If all counsels were "**really stating"** that CCI's remaining obligations were "only joint and several liability" then Counsels would have recognized that the actual obligations transferred to PSE, and why then didn't AT&T transfer the traffic? According to AT&T there were no other reasons not to! **Bogus Cover-Up!**

(C) This is a brand new defense for AT&T. AT&T's statement "as AT&T has explained" gives the illusion that this was AT&T's position from day one. AT&T simply fabricated its bogus 8 different counsel "global cover-up" on the fly, and simply never thought the cover con through.

100) AT&T's feeble attempt to cover for its many counsel's concessions by stating that what its counsels were referring to as obligations remaining on CCI's plans

were "joint and several liability obligations" conclusively defeats itself. There is absolutely no way to interpret many different AT&T counsel's concessions other than for what they are; **many concessions that the transferors plans actual (not joint and several liability) revenue commitments and the plans associated shortfall and termination obligations simply do not transfer on partial traffic only transfers under section 2.1.8!**

Mr Whitmeres' clear statement was made before the obligations issue was the focus:

> Mr. Inga's efforts to transfer these end users and leave the plans intact with their commitments, …..AT&T will seek to enforce its rights in the event shortfall and termination charges become due under the tariff and will hold Mr. Inga personally liable for his conduct intended to deprive AT&T of its tariff charges. (See Exhibit X to petitioners initial filing)

101) AT&T's cover up "all of its counsels" quotes were referring to joint and several liability remaining with CCI don't even make sense as the quotes were not addressing joint and several liability. They were quotes explaining what all obligations meant.

Mr. Carpenter's statements to the D.C. Circuit confirm that he fully understood the tariff when he was directly asked by Judge Roberts what "all obligations" meant. Mr. Carpenter correctly explained what "all obligations" meant varied, depending upon what's transferred.

> Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on what's transferred.
> Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on what service is being transferred.

David Carpenter supporting petitioners during Third Circuit Oral Argument:

> We point out in our brief that there's a distinction between transfers of entire plans, and transfers of individual end-users locations. That when the "**plan"** is transferred, **"all the obligations"** have to go along with it. (exhibit V in petitioners filing Pg 15 line 9)

See Carpenter again at exhibit V. in petitioners filing Pg 15 line 23…

> When you're transferring **all** the traffic, you're transferring the **plan**. That is –and the obligations have to go with it, shortfall and termination liability. (emphasis added)

102) **AT&T Counsel Friedman Concession:** Mr Friedman's statement points to 3.3.1.Q regarding responsibilities.

> As AT&T's customers-of-record, Petitioners were responsible for the tariffed shortfall and termination charges. Section 3.3.1.Q of AT&T FCC No 2 See also AT&T Further Comments filed April 2nd 2003 ("AT&T's Further Comments 2003") at 7-8.

AT&T asserts that Mr. Friedman was actually referring to joint and several liability obligations remaining with CCI/Inga, however Mr Friedman was the author of AT&T's brief to the FCC in 2003 stating that CCI had **no** joint and several liability obligations. It was obviously Mr. Friedman's position and concession that led the FCC to correctly interpret that S&T obligations do not transfer under 2.1.8.

103) AT&T asserts on page 28 para 3:

> Petitioners also quote various statements by AT&T and its lawyers in a vain effort to prove that AT&T has repeatedly conceded away the merits of a dispute it has been litigating with petitioners for over a decade. Petitioners cite a series of statements by AT&T lawyers that **simply described the transfer petitioners "*proposed*."**

AT&T's statement makes absolutely no sense. The FCC and DC Circuit were both asked to interpret the transaction as attempted by petitioners under AT&T's tariff. Because AT&T denied the transaction all parties rendered their interpretation of the tariff as to the attempted traffic only transfer. Each AT&T counsel was perfectly clear regarding which obligations transfer. Here is the tie in to the tariff:

AT&T brief in 1996 to Third Circuit Page 29 line 3

> Therefore, **AT&T's tariff provisions** must, under settled rules of equity, be read to permit AT&T not to render performance (i.e**., transfer the traffic**) before receiving **adequate security** that **plaintiffs** will themselves render their **required performance (i.e., fulfill their volume commitments and pay all required shortfall charges).**

104) AT&T stated above that it wanted adequate security on a traffic only transfer and ended up enhancing security within 2.1.8 in May of 1996 when it added additional deposits. Where do you think the deposit requirement landed? Yes, on the transferors plan because the transferor obviously maintained the revenue commitments and the transferors associated S&T obligations on its non transferred plan.

105) AT&T again asserts on page 29 para 1:

> Petitioners also quote statements AT&T's counsel made during oral argument to the D.C. Circuit. Petn. at 18-19. But in the passage they quote, Mr. Carpenter simply recognized that truly de minimis traffic transfers fell outside the scope of § 2.1.8 altogether. See Exh. W (AT&T "would not take the position, then, that any shortfall obligation went with the transfer of a single number"). **One page earlier,** in a passage petitioners omit, Mr. Carpenter indicated **that a single number** could have had an outstanding indebtedness that would transfer. See Exh. 9.

> It was only in the limited context of **de minimis transfers,** then, that counsel suggested that the obligations that transferred might "vary depending on what's transferred." Id. Nowhere, however, did counsel concede that the phrase "all obligations" did not include shortfall and termination obligations, or that these latter obligations might not transfer when virtually all traffic was transferred.

Simply evaluate Mr Carpenter's statements:

> Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on what's transferred.
>
> Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on what service is being transferred

106) Mr. Carpenter was answering the question posed directly to him by Judge Roberts at that time! AT&T admits that it pieced together answers to questions from different pages to create this amazing defense. The statements that Carpenter made about being allowed to only transfer indebtedness (so called **de minimis transfers)** were made to Judge Tatel who also did not believe a word he was saying because Judge Tatel stated that all obligations transferred only on a plan transfer.(Tatel quoted here at page 56 para 135) Petitioners want to know where in the tariff is the **de minimis transfer section?** There is no such thing! Under the Filed Tariff Doctrine AT&T is not allowed to go outside its tariff. AT&T thinks the FCC staff were born yesterday.

107) AT&T actually justifies what Mr. Carpenter says on page 12 of the oral argument because of total nonsense he said on page 11. However, before Mr. Carpenters comments in **2004,** Mr. Carpenter told the Third Circuit in **1996:**

> We point out in our brief that there's a **distinction** between transfers **of entire plans**, and transfers of **individual end-users locations**. That when the "**plan"** is transferred, **"all the obligations"** have to go along with it. (exhibit V in petitioners filing Pg 15 line 9)

108) Was Mr. Carpenter talking about de minimis transfers in 1996 too? Since 1996 comes seven years before 2004 petitioners believe AT&T's "what he said earlier about de minimis transfers" theory is a little suspect! Mr. Carpenter clearly understood that all the obligations transfer on only the accounts that were transferred. This nonsense about Mr. Carpenter was talking about a transaction that doesn't even exist in the tariff would be comical if petitioners weren't waiting 12 years for justice. AT&T has to think the FCC staff is a bunch of morons to believe this excuse.

VI PSE Does Not Assume Revenue Commitments and Associated S&T Obligations on A Traffic Only Transfer

109) AT&T on page 33 the 5th line from bottom:

> if the risk of actually incurring shortfall charges were really slim to none, why did PSE so adamantly refuse to accept the obligation? If petitioners had truly believed the assurances they now provide to the Commission, they could have simply **amended their transfer forms** so that PSE accepted all of CCI's obligations, including its minimum revenue commitments and associated shortfall penalties. Their failure to do so-and their willingness to litigate the issue for over a decade-makes clear that there were economic risks associated with the obligations that PSE was unwilling to assume.

The reality is that PSE actually wanted the CCI/Inga plan but petitioners would not give up its grandfathered plan. Additionally, if PSE assumed CCI's revenue commitment it wouldn't be a traffic only transfer it would be a plan transfer and petitioners would lose its status as AT&T Customers of Record. If the plan was transferred to PSE then CCI would no longer be AT&T's customers of record.

AT&T's 2.1.8 version detailed such: **See EXHIBIT C ANNEXED HERE ON PAGE 164**

> **D.** The Current Customer will no longer be AT&T's Customer for the service as of the Effective Date of the transfer.

110) Petitioners wanted its own contract and AT&T would have required under its tariff, $13.5 million dollars in security deposit on a new plan. Therefore the plan needed to be kept to continue being an AT&T customer and prohibit AT&T from demanding deposits on plans that were immune from shortfall anyway.

111) Additionally, under the Filed Tariff Doctrine a customer can not **amend its form** to participate in a transaction that the tariff does not allow. An AT&T customer can not keep its plan and transfer partial traffic and also transfer its revenue commitment and corresponding S&T obligations, leaving the plan behind with the remaining accounts; that's why when AT&T's attempted Tr. 8179, the change does not show such an option, because it does not exist. For AT&T to now state that it would allow a customer to alter the tariff is absurd. Petitioners knew that such a transaction never did, and never could take place.

112) AT&T's nonsense that PSE refused anything is a farce. PSE was never presented with plan obligations to assume, because it was **not** assuming the plan. CCI/Inga wanted to keep its plan with the obligations. PSE did exactly what it was suppose to do as Judge Politan stated; sign the form. AT&T is acting as if PSE wrote in its submission, "PSE will not accept any obligations!" PSE's cover letter states it is doing a "proper" submission as it had been doing all along allowing other

CSTPII/RVPP 28% aggregators to transfer traffic only to PSE's 66% CT-516 plan.

The FCC should see on page 4 of Exhibit F to petitioners initial filing PSE states:

> Please find a **properly executed** AT&T transfer of Service Agreement (TSA) to move all of the end-user locations, except the 181 account number and the 131 lead number into PSE's CT516. (CSTP/RVPP Plan ID #003690)

113) The fact is petitioners wanted to keep its grandfathered "golden goose" plans with its S&T obligations that it was immune from. **The fact that petitioners wanted to keep its obligations speaks much more of its understanding that the plans were immune from S&T obligations than AT&T's fabrication that PSE did not want the plans.** Petitioners wanted its own CT plan and were negotiating with AT&T for one that would offer more to the end-user than what PSE was offering. Petitioners wanted to safe guard its accounts on PSE's plan temporarily then take them back when it got its own contract tariff that AT&T denied.

VII AT&T Erroneously States that the FCC Did Not Use 2.1.8 to Determine Which Obligations Transfer on Traffic transfers

114) AT&T on page 2 tries to get the FCC to believe that petitioners were contradicting it self. AT&T pg.2 para 2 states:

> They argue, for example, that the Commission has already ruled that the phrase "all obligations" does not include the obligations to pay shortfall and termination charges. But, because it deemed § 2.1.8 wholly inapplicable to traffic transfers, the Commission did not determine-and indeed, could not have determined-what the phrase "all

> obligations" meant. Flatly contradicting themselves, petitioners **elsewhere argue** that the Commission did not actually understand § 2.1.8, and thus mistakenly failed to see why the phrase "all obligations" did not include shortfall and termination obligations.

Petitioners clearly explained that the FCC obviously used section 3.3.1.Q bullet 4 to determine how accounts could transfer from plan to plan but used section 2.1.8 to determine which obligations transfer. AT&T's quote admits that petitioners **made two separate arguments** within its initial filing, as AT&T states **"elsewhere argue"** that the Commission did not actually understand § 2.1.8. What petitioners actually said was that the FCC did not understand that 2.1.8 allowed traffic only transfers. Petitioners did not state that the FCC fully did not understand 2.1.8.

115) AT&T then tries to take the same logic and apply it to petitioner's analysis of the DC Circuits decision: AT&T page 2 para 2:

> Similarly, petitioners self-contradictorily claim that the D.C. Circuit ruled in their favor, but that it, too, did not understand § 2.1.8.

Petitioners explained that the DC Circuit **did understand** that 2.1.8 allowed traffic transfers as well as plan transfers. Petitioners did not say that the DC Circuit did not fully understand 2.1.8; AT&T is trying to deceive the FCC.

Petitioners simply pointed to the statement made by the DC Circuit that said:

> This section on its face does not differentiate between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS--- the telephone service itself. (Petitioners initial filing DC Circuit opinion at exhibit C pg. 7 line 1)

116) The DC Circuit did understand that 2.1.8 allowed traffic transfers however the DC Circuit did not understand which obligations transferred because petitioners were not there to point out that the new customer accepts all obligations only on

what is accepted and included within the "any" "number" of accounts transferred, then reported by the new customer to AT&T. The DC Circuit never had petitioners in depth tariff analysis of "ANY Number(s)" of accounts could be transferred and all the obligations are transferred on only those accounts which are selected for transfer.

117) The DC Circuit would have easily understood that shortfall and termination obligations do not transfer on traffic only transfers if this tariff analysis was available to it. The point here is that AT&T's attempt to make the petitioners look like its statements are "self-contradictorily" is yet another AT&T deception.
On page 3 line 2 of AT&T's comments it states:

> Nor is there any merit to their fallback argument that they had "pre-June 1994" plans that were not subject to § 2.1.8's "all obligations" language.

118) AT&T again mixes apples and oranges. The fact that petitioner's non transferred plans were pre-June 17th 1994 immune from the application of shortfall and termination obligations that remained on it has nothing to do with what obligations get transferred on a traffic only transfer. Even if a plan was not pre June 17th 1994 immune from the infliction of S&T obligations that still does not mean that S&T obligations transfer on traffic only transfers. AT&T's statement is simply an attempt to confuse.

119) AT&T continues its deception on page 4 para 1:

> This dispute arose when petitioners proposed a two-step transfer that had the **evident purpose of evading the minimum revenue commitments** and associated shortfall and terminations liabilities.

AT&T provides no tariff justification how petitioners transfer of the plans to CCI and CCI/Inga's subsequent transfer of some of the traffic to PSE evades minimum revenue commitments, or evades the responsibility of shortfall and termination obligations. In fact it is just the opposite as both the District Court and the FCC explained to AT&T. The FCC has accurately stated that both CCI and the Inga Companies would continue to be jointly and severally responsible to AT&T for its minimum revenue commitments and associated shortfall and terminations liabilities that remain with the CSTPII/RVPP plans; of course AT&T also clearly made this known prior to the scam change.

120) The FCC has already agreed with the District Court's non vacated decision: See Inga Companies initial filing quoting the FCC Decision at exhibit B pg 8 -9 para 11

> Further, **CCI (as well as the Inga companies)** but not PSE, would continue to have been responsible for any shortfall obligations under the CSTP II/RVPP plans **(Also *See First District Court Opinion* at 9.)**

More clarification: FCC Declaratory Ruling exhibit B of initial filing on pg 7 n.51

> (3) CCI would continue to be responsible to AT&T for any commitment associated with the CSTP II Plans (which would not be discontinued); and (4) PSE would assist in moving accounts back to CCI upon written notice from CCI that AT&T required CCI to meet its commitments.

121) Therefore under the traffic transfer AT&T not only has one company to pursue its shortfall and termination obligations but has **both CCI and the Inga Companies**. AT&T is in a better position after the transaction as Judge Politan

explained AT&T has an additional party to pursue" Additionally, the non refuted evidence pointed out in the FCC's 2003 Ruling that the accounts that were transferred could be returned back to petitioners.

122) Furthermore the contract between CCI and the Inga Companies, which AT&T has shows that end-user accounts were also jointly owned by petitioners and CCI. Finally the plans were immune from shortfall and termination penalties due to: (A) Pre June 17th 1994 (B) Section 2.5.7 Shortfall Waiver (C) Oct.1995 FCC Order; D) had already met their fiscal year revenue obligation. (E) First year tariffed shortfall credit. There's more but suffice it to say AT&T's statement that there was a scheme is absolute nonsense as usual.

123) AT&T again gets creative with its argument putting words in the FCC's mouth. AT&T's statement intimates that the **FCC believed** there was a fraudulent transaction: AT&T page 6 para 2:

> The Commission then addressed AT&T's claim that, because the transfers would result in fraudulent evasion of shortfall charges, AT&T was entitled to deny the transfer under the tariffs anti-fraud provisions.

The FCC actually stated on page 8 para 11.

> Based upon our review of AT&T's tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff – **which we do not decide** – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE.

124) The AT&T con here is to try to make believe the FCC agreed with AT&T's bogus assertion that there was a fraudulent transaction that was attempted. Just one of the many cons AT&T has tried in the past, and was shot down, but AT&T resurrected it due to a new audience. Maybe AT&T thought petitioners would not catch their deception this time around.

125) AT&T again attempts to misrepresent what was already argued by AT&T before the FCC. AT&T states on page 6 footnote 3:

> In so ruling, the Commission **did not consider** tariff language that authorized AT&T to prevent fraud by refusing to provide PSE the **new service** that it was requesting through the transfer.

AT&T asserts that the FCC failed to consider §2.8.2 which may be used to deny additional service in the case of suspected fraud. First of all why AT&T was even allowed to argue fraudulent use before it ever convinced any Court or the FCC that it was sure to obtain S&T liabilities is a travesty. Even if the plans were not immune it still was not justification to argue fraud.

The FCC actually stated on page 8 para 11.

> Based upon our review of AT&T's tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff – which we do not decide – **those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE.**

126) AT&T's Counsel Fash admits in his July 3rd, 1996 letter that "**shortfall charges could not have been the subject of litigation**" at the time of the Jan 1995

traffic transfer because the plans "did not expire until March 31, 1996" (exhibit BB in initial filing.) Therefore AT&T had no right to assume the plans were going to go into shortfall; especially when AT&T now concedes the plans were grandfathered.

127) AT&T had absolutely no right to claim potential shortfall liabilities in the first place as the petitioners fiscal year commitments were met at the time of the traffic only transfer. It would be a violation of 201(b)[10] for being unreasonable for AT&T to even attempt to use its fraudulent use provisions on plans that already met its commitment and had pre June 17th 1994 grandfathered rights, as well as 2.5.7 shortfall waiver available.

128) AT&T's 1996 Comments pg 11 n.11 clearly shows 2.8.2 was argued and therefore considered by the FCC. Also AT&T's 2003 Further Comments pg. 5 show sections 2.8.1 and 2.2.4 were also argued. AT&T cannot be permitted to argue fraudulent use again, as the FCC Decision was not overturned regarding AT&T's illegal remedy. Additionally, the FCC's D.C. Circuit brief stated in regard to section 2.8.2 which AT&T claims the FCC did not consider:

> it is common sense that moving traffic away from CCI cannot be considered a denial of "additional service" to CCI. Similarly, PSE cannot be subject to the sanction of denial of service under its tariff for any alleged non-payment of charges by CCI .

129) AT&T's bogus statement that the FCC never considered section 2.8.2 is simply not true, but this certainly does not stop AT&T from making deliberate misrepresentations. Despite what AT&T states, this AT&T argument was

[10] 201(b): Charges, practices, classifications, and regulations "shall be just and reasonable."

absolutely included in the record leading up to the 2003 FCC Declaratory Ruling and considered by the FCC even though it was barred by section 2.1.8's statute of limitations provision of 15 days.

The FCC Decision clearly states that it evaluated section**s** (plural) not just one section (singular):

FCC 2003 Decision Page 14 para 21

> We also conclude that AT&T did not avail itself of the remedy specified in its tariff for suspected fraud and thus cannot rely upon the fraud section**s** of its tariff to justify its refusal to move the traffic.

130) AT&T continues on the bottom of page 6 into page 7:

> In stating that PSE would not assume responsibility for shortfall obligations, however, the Commission was simply describing the transfer as proposed. **Having just ruled (one paragraph earlier)** that § 2.1.8 did not apply to this transfer at all, the Commission's statement was manifestly not a ruling about what obligations PSE would have been required to assume if § 2.1.8 did apply, as petitioners subsequently agued to the district court (and now argue in their new petition).

131) AT&T again attempts to mix apples and oranges by comparing one paragraph and its meaning against a previous paragraph and its meaning. The FCC's erroneous position that section 2.1.8 did not allow traffic transfers has nothing at all to do with the FCC's use of section 2.1.8's obligations language to determine which obligations transfer on a traffic only transfer.

As noted in petitioners initial filing the FCC's delete and add transfer methodology as allowed under 3.1.Q bullet 4 was used by the FCC to determine how traffic could be transferred. However neither section 3.3.1.Q bullet 4, nor any of the

CSTPII/RVPP general provisions have obligations assumed transfer language. Only section 2.1.8 has the joint and several liability language on transfers that the FCC clearly quoted in the 2003 ruling in agreeing with the District Court's non vacated decision.

132) The FCC's 2003 Ruling used 2.1.8's obligations language to interpret and decide which obligations transfer on a "traffic only" transfer. Additionally as detailed in petitioner's initial filing, the FCC also used section 2.1.8 to determine that S&T obligations did not transfer on traffic only transfers when the FCC decided against AT&T's Substantial Cause hearing in 1995. See petitioners initial filing pages 11 -14 from paragraphs 28 to 39).

133) The FCC again explained in its DC Circuit brief that the FCC used section 2.1.8 to interpret that S&T obligations did not transfer on traffic only transfers. See petitioners initial filing pages 14 -16 from paragraphs 44 through 47 for detailed FCC explanation). AT&T simply attempts to confuse the FCC that the original FCC decision could not have used section 2.1.8's obligations language because the FCC didn't use 2.1.8 to decide how traffic only could be transferred under 2.1.8. It is obvious that the FCC used 2.1.8's obligation language as the FCC explained to the DC Circuit.

134) Again we see how AT&T short quotes as on page 7 para 1 states:

> The D.C. Circuit held that "any transfer of WATS required PSE to assume CCI's obligations," id. at 7 (emphasis added)

AT&T is again up to its usual tricks by weaving its way through the DC Circuit opinion taking quotes and piecing them together to try and get the DC Circuit

Decision to give the connotation that AT&T desires. The DC Circuit opinion at 7 does state that:

> "any transfer of **WATS** required PSE to assume CCI's obligations."

However go to the next paragraph on page 7 of the DC Circuit Decision which explains traffic is WATS, not just the plan.

> AT&T's basic argument before this court is that "traffic" even if it is not the same as a tariffed *plan*, is a type of **Wide Area Telephone *Service*** covered by section 2.1.8.

135) Therefore the DC Circuit is simply stating that PSE must assume the obligations on what **traffic** was transferred; and PSE indeed did assume the obligations on what was accepted for transfer. Instead of AT&T deceptively quoting the DC Circuit why doesn't AT&T simply look at its own tariff section 2.1.8(E) which confirms that shortfall and termination obligations do not transfer on traffic only transfers. Why doesn't AT&T look at section 3.3.1.Q bullet 10 which states that shortfall and termination are the responsibility of the customer (CCI). The CSTPII/RVPP plan that was not being transferred or terminated as AT&T conceded, defines CCI as an AT&T customer of record. Why doesn't AT&T look at which party it placed the deposits on (the transferor) because that is where the S&T obligations remain on a "traffic only" transfer.

DC Circuit Court Judge Tatel clearly understood during oral argument what all obligations meant:

> MR. CARPENTER: -- but the tariff requires that the transferee assume the obligations as well with respect to all obligations existing at the time of the transfer.
> JUDGE GINSBURG: Well, you said all obligations.
> JUDGE TATEL: **Well, that's only if the whole plan is transferred.**

136) More AT&T deception is seen on page 8 line 4:

> In these submissions, petitioners **falsely claimed** that "the only issue referred to" the Commission was whether § 2.1.8 permits the transfer of traffic without a transfer of the plan itself, that the "D.C. Circuit has conclusively decided that issue in [petitioners'] favor," and that the Commission's "2003 opinion compels the conclusion that the entire `obligations' issue"-i.e., the meaning of § 2.1.8's "all obligations" requirement-"is nothing more than a red herring aimed at further delaying this case." See Exh. 6, Br. in Supp. of Pls.' Mot. to Lift Stay at 9-10 (emphasis petitioners'). See also id. at 12 ("the question of which obligations are assumed on traffic transfers without the plan has already been answered by the FCC and there is no reason to return to the FCC for a ruling on this non-issue").

The above statement is **not a false** statement. As soon as the DC Circuit accurately determined that 2.1.8 allowed both traffic only transfers as well as plan transfers it **automatically determined** that S&T obligations do not transfer on traffic only transfers under 2.1.8, because under the tariff you can not transfer away shortfall and termination obligations from the transferors CSTPII/RVPP plan as per AT&T tariff section 3.3.1.Q bullet 10 (exhibit D in petitioners initial brief) and section 5 (exhibit CC in petitioners initial brief). Shortfall and termination obligations are the responsibility of the AT&T customer which was not transferring away or terminating its CSTPII/RVPP plan as all parties agree. When the DC Circuit answered the tougher question:"Does 2.1.8 allow traffic only transfers? The DC Circuit automatically by default answered the easy question: "Which obligations transfer on traffic only transfers?" Answer: shortfall and termination obligations do not transfer on traffic only transfers.

137) When the DC Circuit correctly determined that 2.1.8 allows traffic only transfers as well as plan transfers it also ruled by default that S&T obligations do not transfer on traffic only transfers because the tariff **does not allow a CSTPII/RVPP plan to exist with zero shortfall or termination obligations.** Under AT&T's bogus theory CCI's CSTPII plan would have zero shortfall and termination obligations after all the (S&T) obligations were transferred to PSE. The only time a CSTPII/RVPP plan has zero S&T obligations is the day the plan no longer exists! Zero obligations are not possible under that tariff for several reasons:

138) AT&T's tariff only allows for two options under the tariff: (A) transfer the plan with the accounts and in that case the S&T obligations transfer; (B) The only other option is to transfer traffic only and the S&T obligations must stay with the transferor. There is no tariffed option to transfer traffic only and transfer all S&T obligations thus leaving the transferors CSTPII/RVPP plan with zero S&T obligations and no revenue commitment.
This is substantiated by several reasons under the tariff:

139) there is no credit for over commitment carried over into subsequent years. If the commitment is 3 years at $60,000 per year and the aggregator did $100,000 in year one the commitment in year two is still $60,000, therefore there must be a shortfall & termination obligation on the CSTPII plan. The AT&T Network Services Agreement contracts and AT&T's tariff all mandate a minimum CSTPII commitment. The list of CSTPII/RVPP commitment options are all specified by tariff. The point is there must always be a commitment on a CSTPII/RVPP plan.

140) Additional tariff evidence that CSTPII/RVPP plans must having a minimum commitment is due to AT&T's CSTPII/RVPP Enhanced Billing Option (EBO). This option mandates that AT&T will only do the end-user billing and remit a check to the aggregator if the minimum commitment is at least $600,000 per year. All aggregators transferred "traffic only" and AT&T never cut off the transferor for from EBO. See exhibit EE to petitioner's initial filing and notice the AT&T Network Services Commitment Form mandates the aggregator to "choose one" commitment level. Additionally you will notice the plans had opted for annual commitments not monthly. There is no ZERO commitment level, therefore AT&T own contracts and tariff directly oppose its position that there can be a CSTPII/RVPP plan with zero obligations due to having transferred all of them to a transferee.

141) AT&T's tariff under "Discontinuance With or Without Liability" provisions mandate that the **remaining commitment** be extended over a new contract period. There is no provision under this tariff section for a CSTPII with zero remaining revenue commitment. There is no third option to transfer traffic and all S&T obligations/revenue commitments and keep the remaining plan with zero obligations. When the DC Circuit correctly decided that 2.1.8 allows traffic only transfers it by default also decided S&T obligations do not transfer on traffic only transfers. The reason why AT&T cannot produce any evidence to support its bogus theory that S&T obligations transfer on traffic only transfers and the transferors plans remains with zero commitments is because no such evidence exits. AT&T claims it has done tens of thousands of traffic only transfers and has never shown

one that supports its bogus theory. The one 2.1.8 traffic transfer AT&T produced supported petitioners.

VIII Section 2.1.8 Tariff Analysis

142) AT&T continues its deception on page 10 line 2 when it attempts to **focus in** on paragraph B and ignore the opening of 2.1.8 that defines what part of the traffic is being transferred that the obligations pertain to. AT&T states:

> For present purposes, the critical condition was set forth in section B, which stated in full: The new Customer notifies [AT&T] in writing that it agrees to assume all obligations of the former Customer at the time of the assignment or transfer. These obligations include (1) all outstanding indebtedness of the service and (2) the unexpired portion of any applicable minimum payment period(s).

AT&T's con is to take the words "all obligations" out of context of 2.1.8.

Section 2.1.8 stated in full:

> Transfer or Assignment – WATS, including **ANY** associated telephone **number**(s), may be transferred or assigned to a new Customer, provided that:
>
> A. The Customer of record **(former Customer requests)** in writing that the company transfer or assign WATS to the **new Customer.**
>
> B. The "**new Customer" notifies the Company** in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include **(1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).**
>
> C. The Company acknowledges the transfer or assignment in writing. The acknowledgement will be made within 15 days of receipt of notification.

> The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. **These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s).** When a transfer or assignment occurs, a Record Change Only Charge applies (see Record Change Only, Section 3).

143) The D.C. Circuit stated:

> This section on its face does not differentiate between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS--- the telephone service itself.

The D.C. Circuit and the FCC did not see on its face where within 2.1.8 it allowed partial subsets of traffic to transfer because it is very easy to miss. The differentiation is actually in the "any" number(s) of accounts that the new customer accepts. Any can be one, some, or most, without specification, that can be transferred. If 2.1.8 only allowed plan transfers the word "any" would have to be changed to ALL.

144) "All obligations" pertain to, or as AT&T counsel Mr. Carpenter stated depends upon, what is transferred. Under 2.1.8 at "B" "the "new" Customer notifies the Company" (Company=AT&T), what it has accepted (traffic or plan) and is then of course is obligated for "all the obligations" on "**that which it accepts.**" Of course, shortfall and termination obligations are not transferred/assumed because these obligations are the Transferor Customer's obligations as per (3.3.1.Q bullet 10) that cannot be transferred from the Former AT&T Customers (plaintiffs), as AT&T admitted the plans were not being transferred or terminated.

145) If the D.C. Circuit had seen on its face the differentiation, then it would have easily understood that para. "B" pertains to what (how much traffic or the plan), is accepted and **reported by the new customer** to AT&T. Simply 2.1.8 para B is conditional on "any" "number(s)" in 2.1.8's opening sentence and the transfer between old and new customer within Para A. **The new customer accepts the obligations only on the WATS it accepts.** AT&T's has simply taken the phrase all obligations out of context. This is the reason why AT&T cannot produce any evidence to support its bogus theory that S&T obligations transfer on traffic only transfers, because no such evidence ever existed; despite the fact that AT&T claims it has done tens of thousands of traffic only transfers and still does them today, without the S&T obligations transferring. Later petitioners will demonstrate this further using subsequent 2.1.8 versions.

IX Section 2.1.8 Was Not Explicit To Say the Least

146) AT&T also states on page 10 para 1:

> The phrase "all obligations" inescapably **meant** that a transferee had to accept each and every obligation of the transferor with respect to the traffic, or service, transferred.

What AT&T claims it **meant** to say and what 2.1.8 actually states are obviously two different things as AT&T readily concedes.

147) Clearly, 2.1.8 contains no such specific reference to S&T obligations. The FCC correctly noted Rule 61.2 at pg. 10 footnote 65 which is at exhibit B to petitioners initial filing, stating:

> Pursuant to Rule 61.2, titled "Clear and **explicit** explanatory statements, as in effect in January 1995, in order to remove all doubt as to their proper application, all tariff publications must contain **clear and explicit explanatory statements** regarding the rates and regulations." 47 C.F.R. 61.2 (1994). It is well settled rule of tariff interpretation that "tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carrier controls, **for the user can not be charged with knowledge of such intent or with the carriers canon of construction.** Associated Press Request for a Declaratory Ruling, 72 FCC 2d at 764-765, para. 11 (quoting Commodity News Services, Inc. v. Western Union, 29 FCC at 1213, para. 2.)"

148) See also 47 C.F.R. § 61.2 (stating that all tariff publications must contain clear and explicit explanatory statements regarding rates and regulations). **Any ambiguities are construed against the carrier.** See Commodity News Services, Inc., v. Western Union, 29 FCC 1208, 1213, aff'd, 29 FCC 1205 (1960).

149) This is not the first time AT&T has conceded that section 2.1.8 was not explicit. Here are just four examples of many regarding AT&T's concession that section 2.1.8 was not explicit:

> I) Plaintiffs, relied on the ground that AT&T had filed and withdrawn a tariff transmittal (No. 8179) that did no more than codify the existing requirements of AT&T's tariff (emphasis in original). AT&T June 2005 at p. 8.
>
> II) A subsequent clarification that 'all obligations' [in 2.1.8] include shortfall and termination obligations does not alter the breadth of the earlier version, (March 27, 2006 letter)
>
> III) AT&T explicitly and consistently maintained that the proposed change was a clarification. (AT&T's May 22nd 2006 brief pg 3)
>
> IV) AT&T submitted a proposed revision of section 2.1.8 that "would have" stated explicitly that liability for shortfall and termination charges was encompassed by the phrase "all obligations. (May 22nd 2006 pg. 2)

150) These AT&T statements are obvious concessions that at the time of the denied Jan 1995 traffic transfer AT&T's tariff section 2.1.8 was **not explicit.** In addition petitioners can cite statements from each Court and the FCC stating that 2.1.8 was not explicit. Clearly, 2.1.8 contains no such explicit reference to the transferring of S&T obligations on traffic only transfers in Jan 1995.

151) The FCC also agreed with the District Court that 2.1.8 was ambiguous during DC Circuit oral argument:

> MR. BOURNE: Well, Judge Tatel, the Commission looked first at the language of Section 2.1.8 and found the language to be **ambiguous,** and concluded that **as the district court had**

Mr. Bourne during oral argument reminded the DC Circuit that it had always adhered to laws regarding tariffs needing to be explicit:

> MR. BOURNE: And the Commission's rules **require tariff provisions to be clear and explicit, and this Court has declined to enforce tariff provisions against customers in the past** when they failed that rule. And the Commission found that that was the case here.

152) The undisputed fact here is that AT&T clearly admits 2.1.8 was not explicit in Jan 1995 and by law it must be explicit; therefore AT&T must be found in violation of its tariff, especially at this stage where this case has gone past full circle.

153) Incredibly AT&T spent 2 pages defining what the word "all" meant and then actually cited cases that are totally irrelevant to the one at hand. None of the cases AT&T has cited has a situation where the transferee assumes obligations for which it did not buy. It is as absurd as John Doe selling one of three cars that he owns to Jack Smith and Jack Smith is being asked to be obligated for the two cars that he didn't buy! This is not a question in which AT&T doesn't know this. AT&T is intentionally misrepresenting itself.

154) Petitioners understand that the New Customer has to **assume all the obligations** on the WATS which it accepts from the old customer. That's the way 2.1.8 worked then and that's still the way it is done today. Section 2.1.8(E), section 3.3.1.Q bullet 10, Section 3.3.1.Q 6& 8 and section 5 all support petitioners analysis of 2.1.8. This is the reason why AT&T cannot produce any evidence to support its bogus theory.

155) A further parallel showing that **all plan obligations are not activated unless all service is transferred** is seen by a study of AT&T tariff section 5 which is found in petitioner's initial brief at exhibit CC:

> 5. Discontinuance of AT&T's 800 Customer Specific Term Plan II- with Liability- When a Customer has AT&T 800 Services covered under the Plan, **disconnection of anyone of the services does not constitute discontinuance of the plan.** Except for conditions covered in section 3.3.1.Q.4, preceding, discontinuance of **all service** furnished under the CSTPII prior to the expiration of the applicable term, constitutes discontinuance of the plan and will result in customer liability as specified following. The amount due the company upon discontinuance will be---35% of the remaining term plan revenue commitment.

156) The termination obligation of a customers CSTPII plan is based upon the revenue commitment of the customers plan further substantiating that termination and shortfall obligations are the responsibility of the transferor. Shortfall obligations can not be transferred away unless the entire plan is transferred away. Also notice that there is no plan obligation liability (termination) unless **ALL SERVICE,** (the traffic) on the customer plan is discontinued from the customers plan. Here **ALL** means **ALL traffic and does not pertain to anything other than 100% of the traffic.** Correspondingly, the obligations to transfer S&T obligations do not come into play unless all (100%) of the accounts are transferred, which did not happen. Section 2.1.8's all obligation language relates to all the obligations for what is selected and reported by transferee to AT&T. S&T obligations are plan obligations not traffic obligations such as indebtedness.

157) Petitioners were experienced in traffic only transfers and knew exactly what they were doing by leaving **18 accounts** on the CSTPII plan, so **ALL Service** was not transferred, thus the S&T obligations remained with petitioners CSTPII plan and also perfectly tying in with section 3.3.1.Q bullet 10 (exhibit D) of petitioners initial filing. Section 3.3.1.Q bullet 10 clearly states that S&T obligations are the customers and the customer is defined by plan ownership. Furthermore, AT&T's own senior counsel Charles Mr. Fashs' letter explained at exhibit H of petitioner's initial filing also conceded the CSTPII plan structure remained in tact as long as **all the accounts** were not transferred.

158) AT&T spends pages trying to explain what the word include could mean and cites various definitions. This is self defeating because if **anyone needed to spend that much time trying to figure out what 2.1.8 meant it would be considered not explicit**. Therefore under the law AT&T must lose. (Petitioners will explain later in detail at paragraphs 294-305, that it does not make a difference what obligations are listed after the phrase "These obligations include:")

If ever there were a tariff section that was the poster boy for confusion it was 2.1.8. Consider that multiple Judges (including our current Supreme Court Justice John Roberts) as well as the FCC found it totally ambiguous. The FCC noted in 2003 it was ambiguous and it thought at that point it got it right. This case should be used as thee example of how huge carriers will be able to destroy companies due to a tariff provisions ambiguity. Lawsuits are started over tariff provisions and the little guy gets put out of business in the mean time. The FCC can and must rule against AT&T on ambiguity.

IX Oh Where, Oh Where, Has My Shortfall Gone

159) AT&T itself told the FCC in Jan. **1995** that shortfall and termination obligations were included within 2.1.8's second obligation minimum payment period. When the FCC told AT&T, (as indicated by the FOIA notes), that the minimum payment period did not include S&T obligations, AT&T in **2003** when commenting to the FCC had to revert to a position that shortfall and termination obligations were not included in minimum payment period.

160) Then in June **2005** when before the District Court, AT&T went back to its argument the S&T **was included** in minimum payment period. Then in **2006 ,** incredibly before the same Judge Bassler, AT&T again changed its position for the 3rd time (switching back and forth twice) and stated shortfall and termination obligations are not included in 2.1.8's second obligation minimum payment period.

161) If AT&T itself can not decide where its shortfall and termination obligations are in 2.1.8, how is a business owner suppose to interpret what obligations are included in 2.1.8? That's why tariffs are mandated to be explicit.

162) Here is a history of the scam AT&T has pulled as petitioners detail AT&T's double flip flop switcheroo, as it changes its position three times, regarding where supposedly in 2.1.8 shortfall and termination obligations are:

AT&T states in 2006 AT&T Opp. Brf. at p. 12-13, fn. 3.

> In yet another attempt to mislead, plaintiffs suggest that AT&T's clarification defense is "bogus" and has not been consistently maintained because AT&T did not argue to this Court or the FCC "that S&T obligations are encompassed within minimum payment period." Motion at 13. But AT&T's **consistently maintained position** is that these obligations are encompassed within the phrase "all obligations, "not the phrase "minimum payment period."

163) AT&T initially argued to the FCC in 1995 before it lost its Substantial Cause Pleading that transferring S&T obligations were encompassed within minimum payment period as the FCC FOIA notes indicate:

> Moreover, the unexpired portion of any applicable min pay period would **not** seemingly include unexpired portion of any term of service

> and usage or rev commit but has its own unique meaning and, therefore, the provision about the term plan and commitments **being included as part of the min pay period** in conflicting and **we find in favor of customers in cases of conflicts**. (emphasis added)

164) AT&T in 1995 had obviously asserted to the FCC in its' Substantial Cause Pleading that S&T obligations were encompassed within minimum payment period and the above FCC notes show the reaction from the FCC in preparation for its meeting with AT&T.

165) AT&T's briefs from 1996 through the DC Circuit decision **never maintained** the same AT&T position that transferring S&T obligations were encompassed within 2.1.8's second obligation--- minimum payment period. AT&T cannot refute petitioners' statement that AT&T cannot provide examples of a maintained position on where these S&T obligations supposedly are.

166) The two District Court Opinions, the Third Circuit Decision, the FCC Decision and the DC Circuit Decision do not reflect AT&T stating that transferring S&T obligations were within minimum payment period(s). Obviously, AT&T did not make that same nonsensical argument, because it lost that argument, to the FCC in its Substantial Cause hearing. However, after petitioners produced AT&T's November 1995 prospective changes to 2.1.8, **AT&T needed to revert** back to the old **initial position** that S&T obligations **are within 2.1.8's second obligation "minimum payment period."**

167) However, this time AT&T added a new twist to the District Court in 2005 that only the indebtedness obligation was transferred because if S&T were encompassed within the minimum payment period that of course would mean under AT&T's theory that S&T obligations were actually transferred. Thus, for the first time ever, AT&T stated that plaintiffs did not transfer the second obligation which according to AT&T includes the requirement to transfer S&T obligations.

168) Amazingly, AT&T argued that it did not transfer the traffic in 1995 based upon a comment by petitioners taken out of context ten years later in 2005. Indeed, AT&T in 2005 clearly took the position that S&T volume requirements are within the minimum payment period of 2.1.8:

AT&T June 13, 2005 Brf. at p. 7-8.

> First section 2.1.8 requires assumption of all obligations of the former customer, including (1) outstanding indebtedness and (2) "the unexpired portions of any minimum terms of service period." But the Inga Companies asserted that **only the latter obligations** must be assumed and that the term and volume requirements at issue here not matters that had to be assumed, relying on the irrelevant ground that the minimum term for other WATS services under the tariff is one day. JA 187 (See Tariff No 2 Section 2.5.5, Brown Aff., Ex. C)

169) AT&T placed quotes around the second obligation above to focus on minimum payment period and then deliberately misstated it as "service period" than "payment period" to further give the impression that S&T obligations are somehow **within minimum payment period**:

AT&T again in 2005 to the District Court:

> Under their view, the Court should now determine such matters as whether the phrase "all obligations" in section 2.1.8 **somehow excludes** minimum volume/term commitments; **whether these commitments are part of the minimum payment periods" within the meaning of section 2.1.8**
>
> (2) that the term and volume commitments that give rise to shortfall/termination liabilities **are not unexpired portions of minimum payment periods**,

170) AT&T, scrambling for a defense in 2005, simply revised the old 1995 FCC defeated initial position that transferring S&T obligations was somehow **within minimum payment periods**. Then AT&T's re-argument reply brief in the District Court at 12-13, n. 3. in 2006 did a another switcheroo for the second time to the same Judge!

> AT&T's **consistently maintained** position is that these obligations are encompassed within the phrase "all obligations," **not the phrase** "minimum payment period.

171) These are deliberate misrepresentations from so called officers of the Court! Imagine AT&T even told the District Court Judge Bassler that it was a **consistently maintained** position! It is obvious that AT&T created new defenses and constantly changed positions. Only after petitioners presented the District Court the FCC FOIA notes, the Meade Certification, the Fash letter and Carpenter quotes, AT&T again changed its' position and again "moved" where the S&T obligations "supposedly" are within 2.1.8.

XI AT&T Deliberately Misinterprets What PSE Must Assume

172) AT&T's tariff analysis also falsely quotes petitioners:

AT&T states on page 15 para 1:

> Simply put, while customers may have had discretion about what benefits to transfer, § 2.1.8 conditioned the transfer on the transferee's assumption of "all obligations of the former Customer," **not merely those obligations the new customer chose to accept and report.**
>
> And
>
> A transferee had no discretion under § 2.1.8 to decide which obligations it would or would not accept.

173) Petitioners **never said** that PSE has discretion to choose which obligations it wishes to assume and conversely which of those that petitioners would transfer. The transferee (PSE) only has the discretion to choose how many end-user accounts it wants or whether it wants the entire plan. Once the transferor (CCI) and the transferee (PSE) agree on what accounts were to be transferred, PSE must then assume **all the obligations** on only what part of WATS it accepted, which PSE did.

173) If PSE accepts just part of the traffic it must assume all the obligations on all the traffic it accepts. The revenue commitments do not transfer and hence the shortfall and termination obligations do not transfer because those are the transferors Customers plan commitments, as AT&T explained prior to the FCC Decision.

The FCC's Counsel correctly stated to the DC Circuit the accounts do not have shortfall commitments:

> MR. BOURNE: each individual end user doesn't have a particular level of commitment.

174) AT&T is intentionally confusing PSE's discretion to choose accounts with its requirement that it must assume all the obligations on those accounts it accepted. PSE did not attempt to choose which obligations it wanted. The FCC should see on page 4 of Exhibit F to petitioners initial filing PSE states:

> Please find a **properly executed** AT&T transfer of Service Agreement (TSA) to move all of the end-user locations, except the 181 account number and the 131 lead number into PSE's CT516. (CSTP/RVPP Plan ID #003690)

PSE was not seeking to alter 2.1.8's obligation language. It was properly doing a traffic only transfer as it had done numerous times prior with no S&T obligations transferring.

175) To further detail how ridiculous AT&T position is, the FCC must consider under AT&T's bogus theory that PSE's obligations would have to also include on the **traffic that was not transferred** from CCI. Under AT&T's bogus theory PSE would have to also assume the bad debt on the traffic that it never accepted! According to AT&T's bogus theory all obligations transfer and that would also mean 100% (all) the transferors' bad debt responsibilities would transfer as well. The tariff is clear as per CSTPII general provisions 3.3.1.Q bullet 6 and 8 that AT&T would debit PSE for the accounts that went to its plan and CCI would be debited for the bad debt on the accounts that remained on its plan as Judge Politan's non vacated decision detailed.

176) However under AT&T's bogus theory CCI would have zero bad debt responsibilities left and thus PSE would be responsible for paying the bad debt of CCI's remaining end-users that were not transferred, because AT&T claims PSE has to assume "**all obligations"** which obviously include indebtedness. Absolutely ridiculous and impossible under the tariff! Under the tariff the bad debt (indebtedness under 2.1.8) is deducted from the RVPP credit pool of the CSTPII/RVPP plan holder; see 3.3.1.Q bullet 6 and bullet 8. This also proves that all obligations pertain to only what is transferred.

177) There are no tariff provisions that would make PSE liable for the indebtedness on the traffic that remained on CCI's plan. Obviously indebtedness is included in all obligations, but according to the tariff (3.3.1.Q bullet 6 and bullet 8) PSE is not liable for indebtedness on the accounts that are not accepted. Likewise PSE is also not obligated for CCI's CSTPII plan commitments (S&T obligations) because as with the obligation for indebtedness on the accounts that were not transferred, those obligations are not PSE's responsibility, as AT&T argued to Judge Politan.

178) Additionally AT&T can not even claim that PSE would be jointly and severally liable for the indebtedness on the accounts that remained on CCI's plan because 2.1.8(E) of course does not even address minimum payment period or indebtedness. The obvious reason is that the bad debt and minimum payment period commitments for the accounts that remain on CCI's plan are only those obligations of CCI; as are the S&T obligations that also do not transfer.

179) For AT&T's bogus obligation theory to work it would be expected that PSE also had to be obligated to assume the bad debt on the accounts not transferred; and that is clearly not the case. This again confirms that PSE is responsible for all the obligations on the accounts it accepts. All the tariff sections 2.1.8(E); section 5; Section 3.3.1.Q bullets 6, 8, and 10 all support the position that S&T obligations do not transfer on a traffic only transfer. Of course exhibit J in petitioners initial filing shows S&T obligations are not mandated to transfer; never were and still aren't today. It has been one deliberate big AT&T con game on the US Judicial System.

XII AT&T Spins the FCC's Statements on Maintaining the Balance of Obligations Between parties under the Tariff

180) AT&T also spins what 2.1.8's purpose is. AT&T states on pg16 line 4:

> As the Commission recognized in its prior decision, and as the D.C. Circuit confirmed, "the `purpose' of Section 2.1.8 `was to maintain intact the balance of obligations and benefits between **parties** under the tariff when one customer stepped into the shoes of another.

181) AT&T deliberately confuses the FCC's statement as only considering the relationship between the transferor and the transferee regarding which obligations are transferred/assumed. When the FCC used the word "parties" it was referring to was the relationship that the transferor and transferee had **to AT&T, not solely the CCI-PSE relationship.** What is being referred to is the obligations of CCI and PSE to AT&T not the obligations between CCI and PSE. The whole purpose of 2.1.8 was to make sure that the CCI and PSE remained obligated to AT&T for the plan

commitments and all the traffic commitments. Every one knows the saying "I wouldn't want to be in their shoes." What is being referred to is the obligation that those shoes face; in this case AT&T's obligations.

182) In an attempt to spin the FCC's statement AT&T makes this statement on pg 16 para 2, to focus on the relationship between CCI and PSE:

> The plain terms of § 2.1.8 ensured that **PSE would have enjoyed the benefits of the transferred traffic** subject to the same terms under which CCI and petitioners had enjoyed those benefits-i. e., subject to the minimum revenue and term commitments, and the associated penalty obligations that apply if those commitments are not met. Such an interpretation thus" **maintain[s] intact the balance of obligations and benefits between parties** under the tariff when one customer step[s] into the shoes of another.

183) As the FCC can see AT&T focuses on the benefits of PSE as it relates to CCI. The fact that AT&T total obligations from CCI and PSE are totally covered after the transaction is not mentioned. AT&T's name is not found as one of the 3 parties under 2.1.8 that the FCC was referring to. AT&T intentionally misreads the FCC's position as a one to one transaction between CCI and PSE with AT&T not involved. Section 2.1.8 also involves the third party company AT&T. The FCC clearly understood that the transferor and transferee should be obligated to AT&T for the same reciprocal obligations after the transaction as before the transaction.

184) FCC to the DC Circuit page 19 para 1

> More fundamentally, however, AT&T's argument collapses, because it incorrectly presumes that, apart from the transferee's assumption of liabilities (which occurs under a transfer of plans, but not a transfer of traffic), a transfer of traffic and a transfer of plans yields identical **benefits and burdens to AT&T** and its customers. That is not the case. Where there is a wholesale transfer of plans pursuant to section 2.1.8 (as in the Inga-to-CCI transactions), the transferee "step[s] into the

> shoes of the [transferor]" and *replaces* the transferor as the party liable for any *future* purchases of service. Order, para. 9 (JA 7) The transferor does remain liable for "outstanding indebtedness" and the "unexpired portion of any applicable minimum payment" obligation existing at the time of the transfer. See order n46 (JA 6) (quoting section 2.1.8). By contrast, when only traffic is moved, the party reducing its traffic (in this case CCI) "would continue to subscribe to its existing CSTPII plans, and the totality of **the reciprocal obligations between that party and AT&T under those CSTPII plans would remain in effect,** both with respect to service that already had been purchased at the time the traffic was moved *and* with respect to any future service taken under the plans. *Order*, para 9 (JA 7). **Thus, each method of structuring the transaction presents distinct benefits and obligations for both AT&T and the customer**, and the Commission's reading gives meaning to **section 2.1.8.**

It is clear that the FCC's understands that the transferee must assume all the obligations on what portion of the WATS plan it is accepting. Since PSE did not accept the plan, PSE did not have to accept the CCI plans concomitant shortfall and termination obligations.

185) Indeed, on page 10 para 1 line 8 in its brief, the FCC specifically states that it interpreted 2.1.8 in rejecting AT&T's position that S&T obligations transfer:

> In arriving at the conclusion that section 2.1.8 of Tariff No. 2 did not prohibit the requests made by CCI and PSE to transfer traffic, the Commission rejected AT&T's contention that section 2.1.8 did not permit the transfer of traffic without a plan unless the transferee assumed the original customers liability. Id. at para. 9 (JA 6-8) The Commission stressed, however, that even with the transfer of traffic, CCI still would have to meet its tariffed commitments."

186) And, once again, the FCC confirms on page 11 line 7 that S&T obligations remain with plaintiffs' plans:

> The commission concluded that CCI's obligations remained under the CSTPII and RVPP plans, and that "AT&T's apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question." *Id.* (emphasis added)

187) FCC brief to the DC Circuit page 16 para 2 line 4:

> Section 2.1.8 states that a Customer may not transfer WATS, including any associated telephone numbers(s)" to a new customer unless the new customer confirms "in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment." The Commission explained that AT&T had acknowledged in its comments that the subject of that limitation--WATS--referred to the *plans themselves*. Order, para.9 (JA 6); see AT&T opposition at 10 (JA 249) (in this case the relevant WATS services [to which section 2.1.8's transfer provisions apply] are the CSTPII plans". The Commission concluded--- consistent with AT&T's acknowledgement--that **the assumption -of -obligations limitation** applied to "the wholesale transfer of "WATS" and **"did not preclude** or otherwise govern... the movement of end-user traffic from one aggregator to another, as CCI and PSE sought to effect in this case." Order, para. 9 (JA 6-7)

188) The clear purpose of § 2.1.8 was to ensure that the totality of PSE and CCI's obligations were covered 100% by AT&T for A) account obligations and B) the plan obligations (revenue commitments and their associated shortfall and termination obligations as per 3.3.1.Q bullet ten).

189) The following typical real life traffic transfer transactions also illustrates why the transferee is responsible for all the obligations on the portion of WATS it accepts. Under AT&T's misguided theory, the tariff would allow:

Scenario I: Transferor "A" with a $50 million S&T obligation sets up a Company "B"

that takes out a plan with a puny $1,000 a year S&T obligation, which does not even require a deposit. Company A transfers a handful of accounts to Company "B" and according to AT&T's position A's $50 million in S&T obligations go to "B". Company "B" goes out of business and "A" has no more $50 million in S&T obligation but has all its traffic to send to an AT&T competitor. As opposed to actual reality where the transferor must keep the S&T obligations and are subjected to lose any deposit that it had to pay to obtain the $50 million plan.

190) Scenario II: Same Company A has three smaller aggregators "D", "E", and "F", all who have small plans, $1 million, $2 million and $3million respectively. The smaller companies only want $200,000 worth of traffic transferred to them. In AT&T's wacky world, these assuming companies would never take in $200,000 in traffic if they had to absorb $50 million in S&T obligations with it. Additionally, AT&T would have obtained an additional $100 million in S&T obligations ($150 million to transferees - $50 million from transferor) as under AT&T theory each would get A's full S&T obligations.

191) There were other substantial benefits that these CSTPII plan had while **temporarily** having a few accounts on them which were never provided the DC Circuit. Traffic fluctuates; the CSTPII plan is the perpetual asset. The CSTPII plan was the grandfathered pre June 17th 1994 golden goose. AT&T's statement that substantially all the "benefits" (i.e. end-user accounts) were being transferred away from petitioners' plans is gross misrepresentation of the real benefit--- **the income flow.**

192) Petitioners would have received an additional $2 million a month in revenue. Petitioners had already met its fiscal year commitments, but even if it hadn't the substantially enhanced income flow to the transferors non terminated CSTPII would have easily paid for shortfall charges as Judge Ginsburg and the FCC also understood during oral argument.

> MR. BOURNE: But the money that PSE paid to CCI as part of the transactions would help possibly defray shortfall charges. They still had the ability to get new traffic on their own plan, and PSE promised to assist in moving traffic back, if necessary. It's also --
> JUDGE GINSBURG: I guess it's possible that the discount, the incremental discount available under 5.1.6 is so much greater, so great **that it would more than cover the shortfall charges under CSTP II.**
> MR. BOURNE: Well --
> JUDGE GINSBURG: It's conceivable.
> MR. BOURNE: It's conceivable.

193) The real benefit, the enhanced income flow, was not being transferred with the account traffic. The income continued to go to plaintiffs. There would be virtually no traffic only transfers permissible under AT&T's bogus theory if there needed to be an exact matching of transferors obligations/benefits with transferees obligations/benefits not taking into the transaction AT&T. This is true because each aggregator has A) different levels of commitment and discount levels and B) the plans are fiscal year ends, not calendar year ends.

AT&T also attempted to mislead the DC Circuit as to relationship among the 3 parties by stating that CCI would have to pay twice for the same AT&T service Oral page 39 line 9:

> MR. CARPENTER: And the one thing that we unequivocally lost, I think the arguments that CCI was somehow better off under this deal

are just nonsense, because **they had to pay twice for the service, once to PSE, again to AT&T.**

194) The payment for rendered service was being paid for one time, and it was being paid for by the end-users. The CCI revenue commitments for non rendered service, (i.e. shortfall), were already met and if they were not the revenue commitments are fiscal year ends not monthly. AT&T had zero defenses for the undisputed fact that the fact plans were still pre June 17th 1994 at the time of the traffic only transfer and thus immune from shortfall liability.

195) PSE's plan earned 66% total and gave 28% to end-users who paid for the phone service in full directly to AT&T; and then PSE shared the additional 38% margin with plaintiffs. Plaintiffs would have went from 8% margin on its $54.4 million revenue to PSE paying plaintiffs: 80% of its 38% profit (30.4% margin). Plaintiffs would almost quadruple its income. That was the reason why AT&T objected to the traffic only transfer, no other. All the other bogus excuses are simply a con.

196) If there was bad debt it would be deducted from the PSE RVPP credit pool so the end-users would receive 26% discount if there was 2% bad debt.[11] There is no

[11] The RVPP credit pool would also have been enhanced under this transaction and the sum of whole discount would have been even greater than the sum of PSE's and CCI's revenue if kept on its own plans. This is true because under the tariff AT&T credited the RVPP pool zero RVPP credits on the first $25,000 of revenue; 4% on the amount between 25,000 to $100,000; 5% on the amount between $100,000 and $250,000; and 6% on the revenue above $250,000. Therefore the higher the volume the closer the credit pool approximates 6%. It's similar to setting a limit in Calculus. An additional 1% would be added to the RVPP credit pool on $54.4 million ($544,000 per year) that would enhance all the end-users discounts. Additionally

doubt the both PSE and plaintiffs would be much better off after the traffic only transfer. AT&T simply denied the traffic only transfer because it would lose money.

197) At the time of the Jan 1995 traffic only transfer the fiscal year commitments had already been met, as petitioners detailed in its initial filing (pg 29 para 86 with exhibit at HH), AT&T's own Revenue at Risk Report. AT&T of course did the billing and knows petitioners were way over commitment. AT&T's reply brief failed to produce the billing reports to counter petitioner's evidence.

198) The FCC–DC Circuit speculation of handling shortfall was an exercise in how long the accounts could stay with PSE before CCI would need to exercise the CCI-PSE contract to take them back.[12]

199) Under AT&T's bogus theory AT&T wanted not only CCI to meet its annual revenue commitment but AT&T sought to mandate that **PSE also meet CCI annual commitments**. **Under AT&T's theory it wanted to be over compensated for**

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the bigger the RVPP credit pool the lower the actuarial risk that there will be enough RVPP credits to absorb end-user bad debt.

[12] The fact that the plans had already met its revenue commitments further demonstrates how ridiculous AT&T's argument was for attempting to use its fraud sections of the tariff. Such use of fraud sections on plans that had already met its commitment would have been in violation of. 201(b): Charges, practices, classifications, and regulations "shall be just and reasonable."

commitment on CCI's traffic. This is not matching revenue (benefits) with commitments (burdens) and therefore not what 2.1.8 intended.

200) Under AT&T's bogus theory involving the case at hand AT&T would be grossly over compensated for revenue commitment because CCI had already met its commitment before fiscal year end. CCI had already fulfilled its revenue obligation, now AT&T expects for CCI to all meet CCI's entire gross revenue obligation on the same traffic. AT&T had AT&T and this would be discriminatory under 202 of the Communications Act. Additionally AT&T's bogus theory requests that the entire gross revenue commitment be transferred not even taking into consideration that the transferor may have met a great percentage of it or in this case all of it.

201) The benefits are not the accounts, you have to service them, it is the income received from the accounts that is the benefit, and that income flow benefit remained with the CCI's CSTPII transferor's plans, for which it had already met its commitment. The only way to keep intact the balance of obligations and benefits between parties under the tariff when one customer steps into the shoes of another is to make sure make sure that the transferee assumes all the obligations on what is selected for transfer, this way AT&T is fully protected on all traffic commitments and all revenue (customer plan) commitments.

202) Because the petitioners were not involved in oral argument it also did not have the opportunity to explain that the CSTPII plans were the real benefit and allowed for several other benefits while only **temporarily** having few accounts, thus further

matching benefits with the revenue commitment of the plan. The plan is not just a burden it has several major benefits:

(1) AT&T argues why not just transfer the plan to PSE? Because as an established AT&T customer there would be no security deposits due to CCI/Inga's established impeccable credit history. Once the plan is transferred to PSE CCI no longer is an AT&T customer. Obtaining the plan back from PSE would require posting a $13.5 million deposit.

203) If CCI were to transfer the plan to PSE than CCI would lose the benefit of the Inga Companies remaining jointly and severally liable to AT&T for the plans revenue commitments. The impeccable and long established credit history of the Inga Companies would no longer be 2.1.8's "former customer" if the plan is transferred by CCI to PSE.

(2) Maintains several grandfathered rights (ex. pre-June 17, 1994)

(3) CSTPII plans are renewable at the aggregator's discretion whereas most CT's are not, so at CT's end you have a plan to bring traffic back to (initial exhibit CC at 6.)

(4) Over $100K per year in free airline tickets.

(5) Direct aggregator access to AT&T service.

The FCC was absolutely correct in its position that the transferee must assume all the obligations on only the accounts that it accepts.

XIII

AT&T Attacks Petitioners Two Hypothetical Transactions Under AT&T's Bogus Theory

204) Petitioners have detailed above why plaintiffs' large "traffic only" transfer at hand could not be allowed under the tariff to transfer all the shortfall and termination obligations as well as 100% of the indebtedness and minimum payment period obligations to PSE. Petitioners also explained that this absurdity also prevails when there is a small traffic only transfer and gave two hypothetical scenarios to demonstrate the absurdity.

205) As seen in paragraphs 189 and 190 above Petitioners detailed the abuse that would result in the marketplace under AT&T's bogus theory that revenue commitments and their associated S&T obligations must transfer on traffic only transfers. Such a bogus interpretation would lead to a transferor being able to easily rid it self of its plans obligations. AT&T made a feeble attempt to counter petitioner's exposure of AT&T bogus theory with this AT&T statement on page 17 3rd line from bottom of page:

> The premise underlying this supposed "absurdity," however, is demonstrably mistaken: B's agreement to assume all of A's obligations would not have divested A of those obligations. At the time of the proposed transfer, § 2.1.8 clearly stated that "[t]he transfer or assignment does not relieve or discharge the former Customer **from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment**." Thus, in the scenario petitioners hypothesize, AT&T still would have had recourse against A.

206) AT&T relies upon 2.1.8's joint and several liability provisions to state that the transferor would be jointly and severally responsible for shortfall and termination obligations transferred away. The undisputed tariff fact as seen at 2.1.8(E) is that

remaining jointly and severally obligated provisions only pertain **plan** transfers **not traffic only** transfers. Remaining jointly and severally liable for shortfall and termination obligations means that those obligations had to be transferred. The whole point is that S&T obligations don't transfer on traffic only transfers. Because S&T obligations do not transfer on traffic only transfers there is **no duration issue** of how long the transferor will remain jointly and severally responsible for S&T obligations; the transferor will forever remain obligated for its **actual** non transferred S&T obligations. See exhibit AA to petitioner's initial brief.

207) AT&T itself supported petitioners tariff analysis as it explained to the FCC in 2003 its quote of Judge Politan's non vacated decision of May 19th, 1995 Order at 6, regarding Section 2.1.8's.joint and several liability provision. See exhibit Z to petitioner's initial filing:

> Moreover, as AT&T's customers for all of the locations and all of the traffic generated under the tariffed plans, in terms of the ***transfer*** **of such accounts** the Petitioners would, **but for** the attempt to bifurcate the traffic from the **underlying plans**, **remain jointly and severally liable** with the new customer for all obligations existent at the time of the transfer.

Paraphrase Above: If the transferor transferred the **plan** and not just some of the accounts, the transferor would have been jointly and several liable for shortfall. However on a "traffic only" transfer the transferor does not pass any plan obligations to the transferee.

208) Petitioners made the point with the two scenarios at paragraphs 189) and 190) **that only under AT&T's bogus theory** plan obligations could be easily shed on a traffic only transfer. AT&T attempted to repair by asserting that actual plan

obligations would transfer on a traffic transfer and the transferor would remain jointly and several liable; however all of AT&T's counsel stressed that joint and several liability does not pertain to traffic only transfers.

209) AT&T is judicially estopped from changing its position from the non vacated Judge Politan 1995 decision. The whole point with the hypothetical scenarios provided is that those hypothetical scenarios would lead to abuse and can't exist under the tariff. AT&T made sure that if the business made an S&T commitment it had to keep it. AT&T's attempt to cover-up fails.

AT&T has stressed time and time again that plan obligations do not transfer on traffic only transfers as here:

District Court 1995 non vacated Decision on page 12 line 2; originally page 67 of Joint Appendix to the DC Circuit:

> **AT&T replies** to that assertion by arguing that since only the traffic on the plans was passed to PSE, and "**not the plans themselves with their attendant liabilities,"** PSE's standing and credit-worthiness was **irrelevant to the potential for shortfall and termination liability**. Absent an acceptance by PSE of the **Inga companies' commitments on the plans,** AT&T would not authorize the CCI/PSE transfer.

210) AT&T assert on pg. 18 para 1:

> But petitioners do not explain why the scenario they posit would have been commercially feasible in the first place. As the very term "aggregator" makes clear, resellers had strong incentives to amass as much traffic as possible, not to disperse traffic by setting up "puny" affiliates and distributing small or minuscule amounts of traffic to them.

The obvious reason why the hypothetical transactions would be commercially feasible under AT&T's bogus theory is that if the tariff actually allowed the transferor to transfer away its actual S&T obligations and then do a quick restructure under 2.18E(c) the aggregator would still have all its traffic less the few accounts few accounts it transferred to get rid of all its S&T obligations, bad debt, and minimum payment period.

211) The aggregator could then move all the traffic it didn't transfer (virtually all of it) to an AT&T competitor, and AT&T would have no recourse on the security deposit because the aggregator had met its revenue commitment to AT&T. Controlling all the traffic with zero S&T obligations would obviously be commercially feasible. In reality the way 2.1.8 obviously works is that the transferor who put up the deposit can't transfer away all its S&T obligations despite transferring away most its traffic.

212) Additionally AT&T claims above that the aggregator under AT&T's bogus theory would have to set up "puny affiliates". No! Under AT&T bogus theory setting up just one so called "affiliate" (CSTPII plan) with a puny $1,000 a month ($12,000 a year) commitment, **that would not even require a security deposit of the aggregator,** could wipe out a $120 million commitment in a heart beat, under AT&T's bogus theory that S&T obligations transfer on traffic only transfers.

213) Additionally AT&T states page 18 ---the 2nd line from bottom of page:

> Indeed, the burdens that the Commission's anti-**"slamming" rules** placed on resellers, see 47 C.F.R. Part 64 § 1120(e), created additional disincentives to the types of traffic splintering transfers petitioners hypothesize.

Petitioner's analysis of the abuse that would happen under AT&T's bogus theory **would not require any slamming whatsoever**. AT&T threw that slamming gem in there for "the effect" even going so far to cite the law on slamming, but as usual it is nonsense. The hypothetical scenarios that that petitioners gave that would result under AT&T's bogus theory would not require any need to slam accounts (transfer without permission).

214) If AT&T's bogus theory was reality the hypothetical scenarios would not be unlikely scenarios. In the real world the transferor would lose its security deposit ($13.5 million on the type of commitment that (CCI/Inga had) if it could not meet its revenue commitments, and forever be liable shortfall and termination charges on its plans if it tried to transfer away its traffic and never planned on having it returned. Additionally the income flow from PSE was going to the same corporate entities (CCI and Inga Companies) that had the shortfall and termination obligations; so this proves there was zero intention to bankrupt the plans.

215) AT&T keeps throwing it against the wall but it's just not sticking. Again it all comes down to reality. If AT&T's bogus theory were correct, AT&T would only need to show one actual "traffic only" transaction where the revenue commitment and its associated S&T obligations transferred and the remaining CSTPII/RVPP plan had zero obligations. AT&T claims it has tens of thousands of division sell offs,

partnership break ups, mergers and acquisitions, buy sell agreement scenarios, seller buy backs, etc. All real life traffic transfer scenarios and AT&T has **zero evidence.** That is why AT&T also put the security deposits on the transferors plan and not on the transferees plan because the plan obligations did not transfer. All AT&T has is 200+ pages filed of sheer utter nonsense to waste the FCC's time and eventually the DC Circuits time.

XV If 2.1.8 Covered Joint And Several Liability On Traffic Only Transfers Plaintiffs Plans Would Have Been Exempt Anyway

210) AT&T strongly argued to the District Court that it clarified 2.1.8 by filing 2.1.8(E). However, if AT&T's bogus theory is correct that (S&T obligations transfer on traffic only transfers and CCI only remains jointly and severally liable, and not actually liable for S&T obligations) plaintiffs' plans would have been exempt from joint and several liability charges under 2.1.8 E (c) anyway, early in fiscal year 1995!

211) As per the July 3, 1996 Fash letter, plaintiffs' fiscal year end was April 1st 1995 through March 31st 1996. As per 2.1.8E (c), this commitment period was a "commitment period after the commitment period that includes the Effective Date of the transfer." Specifically: The effective date of the transfer was Jan. 1995 which of course was within the prior April 1994 – March 31st 1995 commitment period.

212) The point that petitioners made is valid. AT&T bogusly argues that joint and several liability applied to traffic only transfers. If AT&T's bogus theory was true

then 2.1.8E which addresses the duration of how long a transferor remains obligated for joint and several liability would address traffic only transfers. However, 2.1.8E does not say anything about traffic only transfers.

213) Even under AT&T's bogus theory, AT&T knew in Jan 1995 that the revenue commitments were already made for the previous fiscal year (April 1994 March 1995). Then when the new commitment period started (April 1995 March 1996) there would be no joint and several liability left as AT&T pointed out. Therefore AT&T was in no position to argue for liability on CCI as under even AT&T's bogus theory CCI's potential for liability would have disappeared.

214) Petitioners hope that the FCC is understanding that is argument is all hypothetical based up AT&T's bogus analysis that joint and several liability pertains to traffic only transfers, when in fact it doesn't. Petitioners were showing that even under AT&T's bogus theory AT&T still had no justification to deny the traffic only transfer.

XVI AT&T Tries to Cover Up for Previous Traffic Only Transfers

215) Continued AT&T nonsense page 18 footnote 10:

> Petitioners claim that, because they had previously transferred traffic to another aggregator, their shortfall and termination obligations had already been transferred away, and thus could not be transferred to, or assumed by, PSE. Id As AT&T has explained, however, those prior transfers did not divest petitioners of their obligations.

AT&T above addresses the 1993 traffic only transfer from Inga Companies to Ameritel; see exhibit Y to petitioners initial filing) AT&T again bases this

argument on its brand new minted defense that when a transferor does a traffic only transfer the actual revenue commitments transfer to the transferee and the transferor remains jointly and severally liable.

216) AT&T's argument fails for a several reason:

(A) S&T does not transfer on traffic only transfers as AT&T's pointed out to the District Court, the Third Circuit and the FCC in 2003 as all the quotes indicated. AT&T needed to change its correct position to the bogus one when the case began to focus on which obligations transfer on a traffic only transfer. AT&T original position to the FCC was correct:

> Moreover, as AT&T's customers for all of the locations and all of the traffic generated under the tariffed plans, in terms of the ***transfer*** **of such accounts** the Petitioners would, **but for** the attempt to bifurcate the traffic from the **underlying plans, remain jointly and severally liable** with the new customer for all obligations existent at the time of the transfer. (Exhibit Z to petitioner's initial filing.)

217) If CCI was jointly and severally responsible for S&T obligations that would mean by definition that the actual S&T obligations transferred to PSE. However AT&T made it clear to Judge Politan in 1995 that PSE was not obligated to assume CCI's plan obligations. From the District Court's 1995 non vacated Decision on page 12 line 2; originally page 67 of Joint Appendix to the DC Circuit. EXHIBITED HERE AS REPLY A (uploaded to FCC server)

> **AT&T replies** to that assertion by arguing that since only the traffic on the plans was passed to PSE, and "**not the plans themselves with their attendant liabilities,"** PSE's standing and credit-worthiness was **irrelevant to the potential for shortfall and termination liability**. Absent an acceptance by PSE of the **Inga companies' commitments on the plans,** AT&T would not authorize the CCI/PSE transfer.

218) If S&T obligations actually did transfer on traffic only transfers and the Inga companies under AT&T's bogus theory were jointly and severally obligated the Inga Plans were

restructured several times into new commitment periods after Jan 1995 and thus as per 2.1.8E(c) the Inga plans had no remaining S&T obligations. So even under AT&T's bogus theory the pig still doesn't fly.

219) Under AT&T bogus theory the Inga Companies would have had only joint and several liability obligations left when it completed its traffic only transfer with Ameritel and Tel-Save; the actual obligations would have gone to the other two aggregators. Because the Inga Companies then transferred its plans to CCI there would be no S&T obligations under AT&T's bogus theory to CCI because the tariff does not require **the 3rd transferee (CCI)** to be obligated for joint and several liability S&T obligations on the Inga Companies joint and several liability obligations. In other words 2.1.8 only addresses the Former and New Customer, not 3 generations back. Remaining jointly and severally liable only occurs when the actual S&T obligations transfer between the former customer and the new customer. Under AT&T's bogus theory CCI would be the 3rd generation transferee and therefore even **under AT&T's bogus theory** CCI still would have zero obligations.

220) In actuality the fact is that CCI did have the actual obligations (not joint and several liability obligations) as per AT&T's position to Judge Politan, the Third

Circuit, and the FCC in 2003. Therefore even under AT&T's bogus theory it again defeats itself. Of course it also fails because this is now another brand new bogus defense never before heard prior to this year and thus it fails under the section 2.1.8's statute of limitations provision of 15 days. AT&T had 15 days to conjure up a bogus defense not 12 years.

XVII Despite the Court Decisions and AT&T's Prior Concessions that PSE Attempted to Assume the Proper Obligations AT&T Flat Out Lies that PSE Wanted to Assume Zero Obligations

221) The AT&T nonsense continues at page 17 footnote 9:

> Contrary to petitioners' claim, Petn. 5-7, AT&T **does dispute that PSE assumed the two obligations listed in § 2.1.8.** Petitioners quote statements by AT&T that the shortfall and termination obligations were not assumed, but **they quote no statements in which AT&T agreed that the other obligations were assumed.** In fact, AT&T counsel argued before the D.C. Circuit that PSE "didn't assume any obligations." See Exh. 9. The phrase "traffic only" that petitioners wrote on each transfer form, see Exh. F (Attachments), could not simultaneously operate to assume enumerated obligations, yet exclude unremunerated obligations. In all events, the point is largely irrelevant-PSE indisputably did not agree to assume "all obligations," as § 2.1.8 required.

AT&T again is wrong. First of all AT&T's argument that no obligations were assumed is barred by the 15 days statute of limitations within paragraph C of section 2.1.8. AT&T never argued this and the following will explain why AT&T never raised it. Again AT&T notes that its bogus argument was raised in the DC Circuit in 2004. AT&T needed to attack the FCC's theory of using 3.3.1.Q bullet four to transfer accounts but knew it would be arguing for petitioner's use of 2.1.8. AT&T

decided it needed to change the con from arguing 2.1.8 does not allow traffic transfers to 2.18 allows traffic only transfers but PSE wanted zero obligations.

222) If AT&T actually believed that PSE was not willing to assume bad debt and minimum payment period AT&T would have claimed so prior to the 2003 FCC Decision. Up until then AT&T only argued that S&T obligations were not being transferred. The non vacated Judge Politan Decision clearly shows the allocation and clearly states that PSE's RVPP would be debited for bad debts for the accounts that were moved to its plan. AT&T did not raise an issue nor appeal the decision.

Additionally, in its initial brief to the Third Circuit, page 33 para 2 AT&T argued:

> The District Court's two reasons for its conclusion that AT&T would suffer "little or no harm" if the injunction issued were both incorrect. **First, it reasoned that end users would continue to pay AT&T for the service they took regardless of whether they took service under a CSTP II plan held by CCI or Contract Tariff 516 held by PSE.** In fact, AT&T is not merely at risk for non payment of the usage charges themselves, **which are indeed paid by end users directly to AT&T,** but also for plaintiffs' **shortfall and termination charges, which can only be paid by plaintiffs** from the revenues they would lose as a result of the transfer. Williams 2d Supp. Cert. ¶ 5 (AA 1261). Moreover, plaintiffs' proposed transfer would greatly increase the probability that plaintiffs would in fact become responsible for shortfall charges.

The above quote directly shows AT&T conceding that the bad debt was to be debited from PSE.

223) Consider the following:

> JUDGE GINSBURG: Is the transfer form part of the filed tariff?
> MR. CARPENTER: No, the transfer form implements the filed tariff.

> JUDGE GINSBURG: Okay, so it's not really authoritative as to whether it's, what the meaning of the tariff is or whether it's even consistent with the tariff.
> MR. CARPENTER: No, but the transfer form happens here to say exactly what the tariff says, and **the only way you can satisfy the tariff is either use our form** or submit in writing something that says exactly what our form says.

224) As Mr. Carpenter stated you fill out the form and that's all you do and that's what PSE did. PSE made no extraneous demands upon AT&T. Notice what PSE wrote on its cover letter to AT&T processing manager Ann Anderson that went in with all the AT&T Transfer of Service Forms at exhibit F page 4 of petitioner's initial filing:

> Please find a "**properly executed" AT&T Transfer of Service Agreements (TSA)** to move all the end-user locations, except the 181 account number and the lead account number into PSE's CT 516 (CSTP/RVPP Plan ID 003690).

225) PSE explicitly stated it was doing a **properly executed** TSA form. Therefore as Mr. Carpenter advised the DC Circuit you "satisfy the tariff" by using the TSA form. Period! PSE's Vice President Pat Bello, certification at exhibit F to petitioner's initial filing also confirmed that PSE was accepting the account obligations (indebtedness and minimum payment period) under 2.1.8.

> As AT&T's customer of record under Contract Tariff No. 516, **PSE is also directly liable to AT&T for the charges incurred** for the outbound and 800 usage of AT&T services by PSE's customers, including the traffic transferred to CCI by Winback which would have been included in the traffic CCI seeks to transfer to PSE." See Exhibit F pg. 2 para 5.

226) Additionally, petitioners' FCC reply comments, in 2003, also confirmed its intent to transfer all obligations listed within 2.1.8 at the time of the Jan 1995 traffic only transfer. See exhibit G to petitioner's initial brief.

> The "new customer" assumes all obligations of the former customer at the time of transfer or assignment. These obligations include: (1) all indebtedness for the account numbers specified in the TSA and 2) the unexpired portion of any applicable minimum payment period(s)

227) Additionally the cover page and each of the nine AT&T Transfer of Service Forms (TSA's) which are verbatim section 2.1.8 show that the only two obligations listed within 2.1.8 were agreed for transfer by the parties; see exhibit F pgs. 4-13 of petitioners initial brief.

The DC Circuit clearly understood that petitioners transferred all account obligations within 2.1.8:

> In a motion submitted after the argument however, the Inga Companies note that the **only obligations** enumerated by Section 2.1.8 are outstanding indebtedness for the service and the unexpired portion of any applicable minimum payment period. (DC Circuit pg. 11, n 2 ex. C to petitioner's initial filing)

228) When the FCC released its 2003 Declaratory Ruling that recognized that plaintiffs did its traffic only transfer under 2.1.8 but ruled that the transaction was not prohibited because the FCC believed traffic could only be transferred under 3.3.1.Q bullet 4 (delete and add), AT&T was in a real quandary. AT&T had to argue against the FCC's 3.3.1.Q bullet 4 methodology **but that meant it had to argue in favor of section 2.1.8 which AT&T recognized petitioners used**. The only way to still win at the DC Circuit was to argue 2.1.8 is the correct traffic transfer provision but AT&T needed to fabricate a defense that petitioners transferred no obligations. Despite 2.1.8 having a 15 day statute of limitations period to raise questions to prevent the traffic transfer AT&T minted a new bogus defense after 10 years.

229) To follow are additional AT&T statements admitting **PRIOR to DC**, that PSE was indeed assuming all the obligations that 2.1.8 required, but AT&T also wanted PSE to assume shortfall and termination (S&T) charges not required:

I) AT&T 2003 DC Circuit Joint Appendix pg 250

> the transfer of traffic and not the underlying plans was with the intent to **avoid the payment of AT&T's tariffed shortfall and termination charges**

AT&T was not arguing that petitioners didn't want to assume minimum payment period and indebtedness.

II) AT&T Footnote 9 2003 DC Circuit Joint Appendix 535

> In fact as explained in its initial comments, the basis for AT&T's "fraudulent use" claim was that the proposed transfer would have transferred the entire revenue stream to PSE without the corresponding obligations to **pay any shortfall and termination charges** under the CSTPII plans.

Petitioners have supplied many others earlier.

230) AT&T's position **prior to the DC Court** was PSE assumed both bad debt and unexpired minimum payment period, the only required account obligations under 2.1.8, but AT&T **ALSO** wanted the transferors plan (S&T) obligations transferred; AT&T wanted a plan transfer. Since AT&T knew that S&T obligations do not transfer on traffic only transfers AT&T also argued fraudulent use provisions. If the tariff mandated that S&T obligations did transfer on traffic only transfers, AT&T would not argue fraudulent use; AT&T would simply argue that its tariff does not allow traffic only transfers. AT&T wouldn't be arguing "fraudulent use" but "no use—no can do!" That's why AT&T tried to retroactively enact Tr. 8179.

231) Only during DC Oral did AT&T add its new bogus we assumed "no obligations" defense. Never before did AT&T ever argue that PSE was not assuming indebtedness and minimum payment period. The FCC clearly understood that the notations were instructional due to multiple uses of the form as it understood move the location **traffic only, but not the plans**; **then stated which accounts to transfer.** The FCC clearly understood:

FCC Decision exhibit B pg.3 to petitioner's initial filing.

> At the bottom of each TSA**, in handwriting**, these parties directed AT&T to move the "Traffic Only" on each plan to PSE. The January 13th cover letter, under which these nine TSA's were forwarded, directs AT&T to "**move the locations associated with these plans [but] not in any way to discontinue the plans.**" (Exhibit H to petition). In this way, CCI and PSE attempted to move to PSE the end-user traffic associated with each of the nine CSTPII/RVPP plans, but not to move the actual plans themselves.

232) To falsely create the impression that PSE wanted to assume zero obligations AT&T tried to pull the con at the District Court stating **that PSE** made the instructional notations on the AT&T Transfer of Service Form (TSA) when in actuality it **was CCI** which made the notations. AT&T also needed to **short quote** the TSA (it doesn't only say just "Traffic Only" it names the accounts. CCI was saying traffic only and names the accounts. The con artists shortened the quote then gave it a whole new meaning. Here's the AT&T deception at work:

In its May 22, **2006** AT&T Reply Brf., to the District Court at p. 10. footnote 4 AT&T asserts that PSE wrote "traffic only" on the AT&T transfer form. In its reply brief, AT&T states:

> As AT&T has previously explained, **PSE "wrote' traffic only'** on the transfer forms to make clear that it was not accepting the plans and the associated obligations for shortfall and termination changes."

233) Again AT&T opens up with:

"As AT&T has previously explained".

The con artists do this every time they introduce a new bogus defense to make it appear as it had been arguing this all along. This was to create the impression that it was a long time stance of AT&T when in fact it was a "brand new" bogus defense. AT&T's misrepresentation got snagged because in the same May 22, 2006 brief at included an exhibit which was AT&T's 1996 brief to the FCC which on page 11 of that exhibit stated **CCI made the notations on the AT&T transfer forms not PSE as AT&T asserted**. AT&T needed to create the impression that PSE did not want obligations so AT&T counsel Mr. Brown "cleverly" decided to short quote and then attribute the notations to PSE instead of CCI under a whole new connotation. AT&T counsel made up the brand new con job on the Court but he just didn't make sure his deliberate lie was fool-proof. AT&T counsel Brown believed that the scam would look better if he could convince the Court that PSE wanted "Traffic Only and No Obligations". As opposed to CCI actually saying transfer Traffic Only and indicate which accounts were transferred. Just one of many Mr. Brown scams uncovered.

234) CCI's owner Larry Shipp in his certification (Shipp Cert. at p. 5 exhibit E within petitioners initial filing) also accurately states he made the notations, and explains why they were made, because they are mandatory, instructional notations:

> The AT&T Transfer of Service Form (TSA) **was used for several different types of transfers.** Therefore as was the norm, **I had to indicate** on each of the TSA's, what type of transfer it was. These were "traffic only" transfers as opposed to plan transfers, as in the Inga Companies transfer to CCI whereby we specified the transfer of the accounts together with the plan. Traffic Only was the common explanation used. **AT&T's conjecture that I was somehow attempting to modify the tariff is absolutely false.**

AT&T's misrepresentation was made to counter the Shipp Certification, but Mr. Brown "forgot" AT&T had already documented in **1996** that CCI made the notations well before Mr. Shipp's Certification.

235) The TSA does not state anything regarding obligations because there are only 2 permissible transactions under 2.1.8 A) traffic only transfer and B) plan transfer and the tariff defines which obligations go or stay for each transaction. There is no need to explain which obligations go or stay. AT&T was expected to process the transfer as it always had with the S&T obligations remaining on the transferors plan. That is why when the DC Circuit ruled that 2.1.8 allowed traffic only transfers the case was over.

236) It is pure deceit for AT&T to state a decade later that the instructional notations on the TSA which were also accompanied with an explanatory cover letter from the transferee PSE, meant move "traffic only" but not the obligations on the traffic.

These were routine common transactions and all TSA's petitioners sent to AT&T had to have notations on them due to the multiple uses for these TSA's as the D C Circuit accurately determined.

237) The District Court Decision by Judge Politan that was not vacated also understood PSE assumed all obligations on the TSA, as evidenced here: District Court footnote number 5 at Joint Appendix pg.59

> As in the plaintiffs' case AT&T deducts from the RVPP discount/rebate remitted to **PSE any bad debt** or unpaid bills accrued by its end user.

This quote clearly shows that the bad debt was going with the traffic to PSE. Petitioners made it clear that the transaction was done as per the tariff and the intent was that all the obligations required under 2.1.8 on traffic only transfers were assumed by PSE:

238) Further evidence:

I) Inga 2003 FCC Comments DC Circuit Joint Appendix pg. 446 Para 53

> "In fact the tariff and AT&T's own form, the Transfer of Service or Assignment (TSA) form, made it possible. We did an assignment of end-user accounts **as per the tariff** and what had been commonly accepted in the marketplace for years."

II) Inga 2003 FCC Comments DC Circuit Joint Appendix pg. 448 Para 58

> AT&T's right to collect from the aggregator if the end-user didn't pay their bill **followed each new plan** to which the end-user accounts were being transferred or assigned. AT&T was totally protected.

III) Inga 2003 FCC Comments DC Circuit Joint Appendix pg. 450 Para. 63

> AT&T's is in a Better Security Risk Position after Assignment. The Court's understanding that there was no credit risk was right. The subject accounts continued to be billed by AT&T and the volume was so large that **bad debt** was not capable of becoming an issue. Moreover, the **credit risk went with the accounts** no matter who owned them.

239) AT&T is bragging that its counsel Mr. Carpenter bogusly argued to the DC

Circuit that PSE assumed no obligations, as is if AT&T asserted it then it must be true! That was the new con of the day. The no obligations scam this gives the following statements also made by Mr. Carpenter more credibility as to how 2.1.8 works:

Mr. Carpenters' statements to the DC Circuit:

> Mr. Carpenter: Yes, but what it **means to assume all the obligations.** What obligations apply **may vary depending on what's transferred.**
>
> Mr. Carpenter: Now what obligations they are going to end up assuming will vary **depending** on what service is being transferred.

240) The obvious con in the DC Circuit was for Mr. Carpenter **to tell the truth about how 2.1.8 works** and what it **means to assume all the obligations;** that they vary depending upon what's transferred, that was to combat the FCC, which believed the 2.1.8 did not allow traffic transfers. Carpenter made the correct statements because he simultaneously minted a new and bogus defense that PSE wanted to assume **no obligations.** No where in the record does PSE ever state it will not accept bad debt and minimum payment period. The con is so apparent, that it is actually comical that AT&T counsel believes that the FCC and DC Circuit are going to believe its nonsense.

241) Obviously if AT&T's No Obligations assumed argument was real AT&T would have addressed it in the District Court in 1995, Third Circuit in 1996 or at the FCC in 2003. AT&T had to intentionally lie to the DC Circuit because AT&T knew it was arguing against the FCC but for petitioner's use of 2.1.8. Petitioners challenged

AT&T to show Judge Bassler one statement that PSE was not assuming both account obligations, but of course AT&T couldn't.

242) The AT&T fabrication on what obligations were assumed got even more bizarre when AT&T gave up the "no obligations" were assumed defense stated to the DC Circuit in 2004 and decided to change that bogus defense to a new bogus "**one obligation"** was assumed defense before Judge Bassler in 2005.

AT&T to the District Court June 13, 2005 Brf. at p. 7-8.

> First section 2.1.8 requires assumption of all obligations of the former customer, including (1) outstanding indebtedness and (2) **"**the unexpired portions of any minimum terms of service period.**"** But the Inga Companies asserted **that only the latter obligations must be assumed** and that the term and volume requirements at issue here not matters that had to be assumed, relying on the irrelevant ground that the minimum term for other WATS services under the tariff is one day. JA 187

243) What AT&T did in 2005 before Judge Bassler was to give up the bogus AT&T "no obligations" were assumed con and do a switcheroo to the bogus "one obligation" was assumed con. Possibly the head AT&T con artist thought it was more believable to lie and say only one obligation was assumed than no obligations were assumed. At this point in 2005 AT&T was also bogusly stating that S&T obligations were included within 2.1.8's "minimum payment period."

244) Petitioners therefore pointed out to Judge Bassler that if S&T obligations were included within minimum payment period why didn't AT&T process the traffic transfer in **1995**? Petitioners pointed out that AT&T was basing its bogus assertion that PSE did not assume minimum payment period based upon comments AT&T again short quoted and took out of context in petitioners post oral argument brief to

the DC Circuit in the year **2005!** Therefore since it was AT&T's position to Judge Bassler that S&T was included within minimum payment period and Inga Companies comments were made in 2005, what was the justification not to transfer the traffic in the year 1995? The con artists were caught again!

245) There was no justification not to transfer the traffic in 1995 based upon AT&T's position in 2005. AT&T was caught again fabricating a new defense, so it has now changed the con game variables again. Now AT&T's con is that S&T obligations are not included within minimum payment period they are included in the word all obligations, and we are now back to the "no obligations" were transferred con.

246) There have been so many different AT&T counsel fabricating so many bogus defenses that AT&T has made a complete mockery of the justice system. Petitioners had to make a 3x5 foot chart just to track the change in lie combination variables! The FCC can simply dismiss this nonsense on both its merit and the 15 day statute of limitations within 2.1.8 as AT&T itself states that it first introduced its new BS in the DC Circuit in 2004.

247) AT&T demanded the $15 million security deposit from Judge Politan because AT&T understood the S&T obligations do not transfer of traffic only transfers. The Judge Politan quote of AT&T also shows that AT&T was only demanding a security based upon CCI/Inga's potential shortfall. AT&T did not state that it was being denied the potential to collect on bad debt and minimum payment period as AT&T

understood that those required obligations were indeed transferred/assumed on the CCI –PSE traffic only transaction. Surely if AT&T believed that the bad debt and minimum payment period obligations on the accounts transferred were not being transferred AT&T would have also premised its security deposit upon not having those obligations transferred. However AT&T clearly understood that PSE was assuming the only two obligations necessary on a "traffic only' transfer and therefore did not premise its security deposit request on the lack of meeting those 2.1.8 requirements.

248) Even AT&T's misrepresentations have wholes. At this point AT&T can't seem to make up a story that will cover itself because it has changed its position so many times that its misrepresentations are now conflicting with not only the empirical tariff evidence but with AT&T's previous positions.

XVIII AT&T Misinterprets the DC Circuit Decision

249) AT&T quotes the D.C. Circuit Opinion at 9 and tries to tie it to the transaction at hand.

> As the D.C. Circuit has explained, "even if small scale transfers of traffic were **outside the scope of Section 2.1.8**, allowing this transaction to go through would create an obvious end-run around the unquestioned rule that new Customers had to `assume all obligations' in transferring WATS ***plans."***

What the DC Circuit was referring to as being **outside the scope of 2.1.8** was the FCC's theory that the tariff allows traffic only transfers under the FCC's delete and add theory as per section 3.3.1.Q bullet 4. The "end run around" that the DC

Circuit is referring to is not using 2.1.8's all obligations language but to evade 2.1.8 by using the FCC's (delete and add) account transfer methodology as per section 3.3.1.Q bullet 4.

250) Look at the DC Circuit Decision in which the actual parties are stated and it states it was within (not outside the scope) of 2.1.8 and further detailed that 2.1.8 was used "**instead of dropping and adding traffic in separate transactions.** "
DC Circuit at page 9 para 1, line 2

> CCI and PSE did request a transfer--- a transaction on its face at least potentially "**within" the reach of Section 2.1.8**, which governs "Transferors or Assignment"---**instead of dropping and adding traffic in separate transactions**.

251) What the DC Circuit was describing in AT&T cite was the hypothetical delete and add scenario the FCC had used as an analogy as to **how the traffic could transfer**. The DC Circuit could not possibly refer to the actual traffic only transaction between CCI and PSE because the DC Circuit was talking about a **plan** transaction **outside the scope of 2.1.8** .

252) Petitioners did not use section 3.3.1.Q bullet 4 (delete and add) which would be **outside the scope of 2.1.8.** Petitioners used section 2.1.8 to **bulk transfer** its traffic and adhered to the obligations language of 2.1.8. Additionally the DC Circuit in its last line of AT&T's citing of the DC Circuit was talking about **all obligations** but it stated it was on a **plan** transfer. Obviously petitioners did a traffic only transfer in

full compliance with section 2.1.8., not a **plan** transfer as the DC Circuit is referring to in reference to the FCC's hypothetical delete and add account movement methodology.

253) Furthermore just look at the next sentence after the one that AT&T cites:

DC Circuit page 9 paragraph 2:

> **Any reseller** could circumvent Section 2.1.8 simply by asking AT&T to move its business **one billed telephone number at a time.** Using such a scheme, a reseller could move every component of a plan, save its obligations to AT&T.

254) The DC Circuit above is referring the FCC's 3.3.1.Q bullet 4 delete and add account movement methodology. The phrase, "any reseller," was not referring to the CCI-PSE transaction under 2.1.8., as the DC Circuit was referring to a transfer in which it was done "one billed telephone number at a time." The CCI-PSE traffic only transfer was not done "one billed telephone number at a time" but utilized section 2.1.8 to do a **bulk transfer** of accounts. In typical AT&T fashion it again short quoted the DC Circuit and attempted to state the opposite of what the DC Circuit was actually saying. Same scam over and over. Short quote and spin. Short quote and spin.

255) The DC Circuit's last statement also confirms that what it was referring to was the FCC's account transfer methodology of deleting and adding accounts under 3.3.1.Q bullet 4.

The DC Circuit states on page 11 para 1:

> All we decide is that Section 2.1.8 cannot be read to allow parties to transfer the benefits associated with 800 Services **without assuming any obligations**.

256) In the above cite the phrase “without assuming any”, obviously means PSE can’t assume no i.e. zero obligations. Petitioners agree with this statement 100%! That is why in the transaction at issue PSE assumed all the obligations on all the accounts that it accepted, specifically the minimum payment period and the indebtedness. The DC Circuit is absolutely correct that you can not assume zero obligations. The DC Circuit then even footnotes on page 11 fn 2 and states what those obligations are under 2.1.8.

The District Court’s May 1995 Decision which was not vacated and thus becomes the “law of the case” makes it very clear:

> **The Inga Companies and CCI** **followed the transfer section of the tariff to the letter,** they ought not now be forced to deal with a unilateral change of the rules by AT&T.

As usual AT&T is misrepresenting the DC Circuit Decision.

XIX AT&T Misrepresents That it Can Charge End-Users for Shortfall and Termination Obligations

257) AT&T intentionally misinterprets Section 3.3.1.Q and its statements are directly opposed to AT&T’s former position, but what else is new.

AT&T states on page 20 paragraph 2:

> This provision simply made clear that the reseller/aggregator (the "Customer") was responsible for shortfall and/or termination liability, even though **AT&T had the right to collect any sums due directly from the reseller's customer (the "individual locations under the plan.**

AT&T Tariff section 3.3.1.Q bullet 10 reads:

> **Shortfall and/or termination liability are the responsibility of the Customer.** Any penalty for shortfall and/or termination liability will be apportioned according to usage and billed to the individual locations designated by the Customer for inclusion under the plan. For billing

> purposes, such penalties shall reduce any discounts apportioned to the individual locations under the plan.

258) AT&T had no right to collect payment from the end-uses because the end-users were not AT&T's customers. AT&T attempts to confuse the law with the Enhanced Billing Option program that was chosen by petitioners. AT&T has already conceded that the billing option used by CCI in which AT&T bills the end-users, does not determine that the end-users are AT&T Customers, or that it gives AT&T the right to bill shortfall and termination charges against CCI/Inga's end-users. The first public comment question that the FCC asked in 2003 had to do with the ownership or control of the end-users and both parties agreed that AT&T had no control.

259) AT&T has already made its position very clear that the end-users were not AT&T's.

AT&T's 2003 Further Reply Comments to the FCC page 1:

> AT&T did not have any carrier relationship with Petitioners' customers (the "end-users"). Petitioners do not dispute the accuracy of these statements; just to the contrary, they repeatedly concede that they and not AT&T had the exclusive carrier-customer relationship with the end-users. Similarly the Petitioners acknowledge that "**although AT&T also rendered bills** to Winback & Conserves end-users on the behalf of the latter entity, **the billing arrangement** selected by the reseller **did not create any carrier–customer relationship between AT&T and the end-users.**

AT&T's 2003 Further Reply Comments to FCC Page 4:

> Petitioners also concede that the *liability* for all charges incurred by each location was solely that of the petitioners not the end-users.

AT&T's 2003 Further Reply Comments to FCC page 4:

> As AT&T's customers-of-record, Petitioners were responsible for the tariffed shortfall and termination charges. Section 3.3.1.Q of AT&T FCC No 2 See also AT&T Further Comments filed April 2nd 2003 ("AT&T's Further Comments 2003") at 7-8.

260) AT&T had no right to bill end-users for shortfall charges since they were not AT&T's customers. See FCC Oct 17th 2003 Decision fn. 52. Exhibit B to petitioner's initial filing.

The FCC 2003 Ruling:

> **As AT&T concedes, the end-users or "locations," were CCI's customers, not AT&T's.** *See* AT&T Further Comments at 6-10 (citing, *inter alia*, *AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd at 16075, para. 3; *First District Court Opinion* at 3); *see also MCI Telecommunications Corp v. AT&T*, File No. E-90-28, Order, 7 FCC Rcd 5096, 5100, para. 20 (CCB 1992). Because these end-users did not choose AT&T as their primary interexchange carrier, **AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them.** *See Hi-Rim Communications, Incorporated v. MCI Telecommunications Corporation*, File No. E-96-14, Memorandum Opinion and Order, 13 FCC Rcd 6551, 6559 para. 13 (CCB 1998).

261) AT&T has no right to apply shortfall to the end-users. That is why it states AT&T can **reduce the discount,** not charge the end-users for shortfall. In essence what AT&T is actually doing is not charging the end-user but taking the discounts away from its aggregators plan.

AT&T again intentionally misleads by using an example of a **non aggregator** customer at AT&T page 20 footnote 12:

> This feature of the CSTPII Plan was **not confined to reseller customers**, but also applied to any entity that subscribed to that plan. For

> example, in the case of a corporate parent that subscribed to a CSTPII Plan for the use of itself and its subsidiaries, § 3.3.1 Q bullet 10 permitted **AT&T to proceed against the affiliates even if the parent entity was unable to satisfy its shortfall obligation.**

262) AT&T is quite aware that it is mixing apples and oranges with this statement. In the aggregator situation AT&T has no right to "proceed against the so called affiliates." The FCC is well aware that AT&T must be treated as if it was passing magnetic billing tape to the aggregator and the aggregator did its own billing. In the traditional sense of aggregation/resale **AT&T would not have the opportunity to charge the end-users of its aggregators anything**. Of course AT&T knows this but is hoping for an inexperienced Judge in the DC Circuit because AT&T knows it won't get this "ability to bill aggregator's end-users" nonsense by the FCC.

AT&T states on page 20 para 2:

> The provision nowhere stated, much less mandated, that, if the locations and their associated traffic were transferred to another reseller, that the **transferor's shortfall and termination obligations had to remain with the plan,** and could not be assumed by the transferee.

263) The point that petitioners made conclusively establishes that 3.3.1.Q bullet 10 mandates that S&T do not transfer. 3.3.1.Q bullet 10 states

> **Shortfall and/or termination liability are the responsibility of the Customer.**

Let's look at termination liability first. Because petitioners plans were not being terminated or transferred as AT&T has conceded, and the termination obligations are plan obligations of CCI the termination obligations must stay with the customers plan. The responsibility for the termination was petitioners.

264) The FCC's Oct 17th 2003 Declaratory Ruling agreed with AT&T's 1996 brief to the FCC determining that CCI's plans were not being terminated. See FCC Declaratory Ruling exhibit B pg 8 Footnote 56 in petitioner's initial filing.

> Although AT&T also argues that the move also avoided the payment of tariffed *termination* charges, *id.*, it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) is not at issue here. Opposition at 3 n.1. That is consistent with the facts of this matter; petitioners never terminated their plans. Accordingly, termination charges are not at issue in this matter.

265) Simply: The plans termination obligations can not transfer because the termination obligation is the responsibility of the Customer and a Customer is defined by the ownership of the plan that was not being terminated or transferred. Like wise with Shortfall obligations: The plans shortfall obligation can not transfer because the shortfall obligation is the responsibility of the Customer and a Customer is defined by the ownership of the plan which is not transferring; additionally the plans had already met its revenue commitment as AT&T's own Revenue Report demonstrates and AT&T did not refute. Even if petitioners had not met its revenue commitment AT&T could not mandate that the shortfall obligations must transfer unless it was a plan transfer.

XX AT&T Tries To Repair 2.1.8E Tariff Evidence Which Shows S&T Obligations DO Not Transfer On Traffic Only Transfers

266) AT&T states on page 21 line 2:

> To begin with, § 2.1.8E did not exist when the transfers were proposed. It first took effect November 9, 1995, see Exh. AA, long after petitioners had sued AT&T for failing to process their "traffic only" transfers. It therefore cannot control the meaning that § 2.1.8 had before this provision was added.

According to AT&T the November 1995 tariff filing adding a section referred to as 2.1.8(E) was simply a **clarification** of section 2.1.8's Jan 1995 version regarding 2.1.8's joint and several liability provision. The fact that 2.1.8(E) was not in the marketplace in Jan 1995 does not mean that it did not accurately depict the correct methodology of how section 2.1.8 as in affect in Jan 1995 was carried out in the marketplace. When AT&T states "It therefore cannot control", you know AT&T realizes the evidence is firmly against it and it needs another way to address it.

267) Section 2.1.8(E) addressed the duration that a transferor of a CSTPII/RVPP **plan** would remain jointly and severally liable on the transfer of the **plan---not traffic.** The reason why 2.1.8(E) **does not address** the duration joint and several liability remain on **traffic only** transfers is simply because there is no joint and several liability on the transferor since the S&T obligations don't transfer. The transferor has to keep its revenue commitment /S&T obligations.

Notice that 2.1.8(E) at exhibit AA to petitioners initial filing states:

All material on this page is new

268) What AT&T was doing with 2.1.8(E) was clarifying 2.1.8 because it stated all material is new. Take a look at **Title 47: Telecommunications** EXHIBITED HERE AS EXHIBIT REPLY D page 166, which is the Explanation of Symbols.

If 2.1.8 (E) was a new regulation it would have had to be depicted with the code symbol N. Since 2.1.8 was not a new rate or regulation but an explanation of existing regulation no N symbol was required. So AT&T can not claim that it required S&T obligations to transfer on traffic in Jan 1995 but then changed it. Symbol "T" would be a change in text but no change in rate or regulation. Section 2.1.8(E)'s regulation was not changing from Jan 1995 and its text was not changing so symbol "T" could not be used.

269) Section 2.1.8(E)'s regulation was not changing from Jan 1995 so symbol "C" was not used, so this confirms that it was not a changed regulation. AT&T can not say that when petitioners attempted its traffic only transfer in Jan 1995, that 2.1.8's joint and several liability provisions depicted different methodology.

270) None of the symbols on the tariff page apply to 2.1.8(E) because it was in fact a clarification that was not a change to the existing tariff and no change in text. It was new simply new text and no change in regulation to further explain how 2.1.8 in Jan 1995 worked. If 2.1.8(E) was not a clarification of an existing regulation AT&T would have stated it was a change. Yes 2.1.8(E) conclusively shows that S&T obligations do not transfer on traffic only transfers. This is why AT&T tells the Commission that it is "Not Controlling." The clear explanation of joint and several liability put the final nail in AT&T's coffin. AT&T's position prior to the FCC Decision was that petitioners kept its actual plan obligations. Prior to the FCC Decision AT&T didn't realize that it needed to also need a con attack on the Courts regarding the obligations allocation.

271) AT&T position in Jan 1995 was made clear to Judge Politan by AT&T that shortfall and termination obligations do not transfer on traffic only transfers. This was further substantiated by section 2.1.8's joint and several liability provisions. Notice that the date of the non vacated Judge Politan Decision is May 19th 1995 Order at 6, which means that this was AT&T's position on Section 2.1.8's.joint and several liability provision even prior to the 2.1.8(E) detailed analysis of instituted in November 1995. AT&T under the Doctrine of Judicial Estoppel[13] is prohibited from changing its position.

272) The following was AT&T's position to the FCC in 2003 stating joint and

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[13] Judicial estoppel emphasizes the connection between a litigant and its use of the judicial system. See e.g. Oneida, 848 F.2d at 419. **This law was made for AT&T…..**

Judicial estoppel is invoked **to prevent abuse of the judicial process** rather than remedy prejudice or detrimental reliance by the party asserting the defense, and **precludes a party from asserting a position in a legal proceeding that is inconsistent with a position previously asserted by that party.** See e.g. Hamilton v. State Farm Fire & Casualty Co., 270 F.3d 778, 782 (9th Cir. 2001) (citations omitted); Oneida, 848 F.2d at 419.

The elements considered when determining whether to apply the doctrine of judicial estoppel are (1) whether the present position of the party is clearly inconsistent with the previous position of the party; **Obviously AT&T's position is directly opposite its former position.**

(2) whether the party advancing the inconsistent position would derive an unfair advantage from the opposing party. See e.g. New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 1815 (2001) (citations omitted); Hamilton, 270 F.3d at 782-83 (citing New Hampshire). **AT&T would derive an unfair advantage.**

Detrimental reliance or individual prejudice is not required in order to apply judicial estoppel. See e.g. Ryan Operations G.P. v. Santiam-Midwest Lumber Co. et al., 81 F.3d 355, 360 (3rd Cir. 1996) ("[w]hile privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required."); Patriot Cinemas, Inc. v. General Cinema Corp. et al., 834 F.2d 208, 214 (1st Cir. 1987) (same).

several liability is not an issue on traffic only transfers. Section 2.1.8E also confirmed that AT&T's position was correct.

> Moreover, as AT&T's customers for all of the locations and all of the traffic generated under the tariffed plans, in terms of the ***transfer*** **of such accounts** the Petitioners would, **but for** the attempt to bifurcate the traffic from the **underlying plans, remain jointly and severally liable** with the new customer for all obligations existent at the time of the transfer. (at exhibit Z in initial filing,)

273) Therefore AT&T own words defeat it as AT&T argues that 2.1.8(E) in November 1995 was just a clarification as to how 2.1.8 worked in Jan 1995. AT&T then makes this statement on page 21 footnote 13:

> For these same reasons, it could not have exempted petitioners' plans from joint and several liabilities, because it did not take effect until after the commitment period that included the effective date of petitioners' proposed January 1995 transfer.

274) AT&T makes the erroneous assumption that 2.1.8(E) covers traffic only transfers; it does not as the exhibit at AA to petitioners initial filing shows. The reason why 2.1.8E does not cover traffic only transfers is that the transferor does **not** have joint and several liability remaining, because it has the actual S&T liability due to the fact that S&T obligations don't transfer. Petitioner's plans would always remain with the actual S&T obligations not joint and several liability obligations. 2.1.8E addresses the duration that the transferor would still be jointly and several liable for the shortfall and termination obligations on the **plan that was transferred.**

CCI/Inga would have not been exempted from actual liability because it did **not** do a plan transfer, it did a traffic only transfer.

275) **If** petitioners did a plan transfer to PSE then petitioners would remain jointly and severally liable after the plan transfer until the first restructure of 1996 in March under 2.1.8(E)(c); however this 2.1.8(E) provision does not apply to petitioners traffic only transfer. That's the point, S&T obligations do not transfer on traffic only transfers so 2.1.8(E) does not address it.

AT&T is stating the fact that a plan would not be able to take advantage of the duration waiver options as in 2.1.8(E)(c) until petitioners started a new commitment period which petitioners agree would have been after the Jan 1995 traffic only transfer as the plans were still pre June 17th 1994 grandfathered.

276) Petitioners were stating in its initial filing that if 2.1.8E applied to traffic transfers as AT&T bogusly asserts then AT&T knew petitioners still had at least one pre June 17th 1994 grandfathered restructure left and therefore should have taken this into account when the Jan 1995 traffic only transfer was attempted. Petitioners were arguing under AT&T's bogus theory that 2.1.8E applies to traffic only transfers.

277) AT&T needed to con the FCC first by assuming that petitioners would have joint and several liability, on its traffic only transfer. What makes AT&T's theory that petitioners actually had joint and several liability remaining on its plan after the "traffic only" transfer totally false is that **by definition this would mean that petitioners transferred the actual S&T obligations to PSE.** Since AT&T is obviously asserting that the actual S&T obligations did not transfer to PSE, that self defeats AT&T's bogus argument and its futile attempt to repair the 2.1.8E's tariff analysis. Simply 2.1.8 E does not address, (for traffic only transfers), the duration a

transferor is to remain jointly and severally liable for shortfall because the transferor must keep its actual plan obligations.

278) AT&T again attempts to confuse the FCC regarding 2.1.8E because 2.18(E) supports petitioner's position AT&T page 21 footnote 13:

> In all events, the issue before the Commission is whether **PSE was required to assume** "all" of CCI's obligations, not what obligations would have remained with CCI had the transfer taken effect.

Because 2.1.8(E) conclusively establishes that the transferor (CCI/Inga) must keep the S&T obligations on a "traffic only" transfer, AT&T attempts to focus on what PSE must assume. The focus on what PSE must assume is simply a red herring; **because by conclusively establishing that 2.1.8E mandates that CCI must keep the S&T obligations on a traffic only transfer it is the same exact outcome as confirming PSE does not assume the S&T obligations.**

279) Despite AT&T misrepresentation, it should be noted that although it is the exact same outcome the primary jurisdiction order does focus on what CCI/Inga **transferred** not what PSE **assumes**:

Judge Bassler ordered:

> It is further ordered that plaintiffs, no later than August 1, 2006, file an appropriate proceeding under Part I of the FCC's rules to initiate an administrative proceeding to resolve the issue of precisely **which obligations should have been "transferred"** under Section 2.1.8 of Tariff No. 2 as well as any other issues left open by the D.C. Circuit's Opinion in AT&T Corp. v. Federal Communications Commission, 394 F.3d 933 (D.C. Cir. 2005).

280) It's obvious why AT&T sought to focus the FCC's attention on what PSE assumes rather than what petitioners transfer. AT&T realizes that 2.1.8(E)'s analysis of 2.1.8's joint and several liability provision conclusively establishes from the perspective of the transferor that S&T obligations don't transfer on traffic only transfers.

AT&T can't possibly overcome 2.1.8(E) but it did give a typical pathetic answer on pg 22 line 4:

> By its plain terms, therefore, the exception applies whenever services (which include traffic) are transferred, not merely when the plan is being transferred.

281) Here AT&T acknowledges that 2.1.8(E) only pertains to plan transfers but ridiculously states that plans include service and traffic is service. **WOW!** The **only service** that 2.1.8E addresses are plans! Another new and bogus defense that every plan transfer is actually a traffic transfer because plans include traffic! AT&T totally blurs the difference between a plan transfer and a traffic only transfer. It is a nonsensical statement that it is a feeble attempt to cover-up 2.1.8(E)'s conclusive answer to which obligations transfer on a traffic only transfer.

XXI AT&T Attempts to Confuse Shortfall and Termination Obligations with Shortfall and Termination Liabilities-Prospective Anyway

282) AT&T's asserts the following page 21 para 1.

> The first half of the November 1995 version of § 2.1.8, which petitioners failed to provide, states that "WATS, including any associated telephone numbers, may be transferred." See Exh. 10. This is the same language that the D.C. Circuit held includes transfers of traffic as well as plans. This version of § 2.1.8 then says (1) that the new customer must assume "all obligations," including "any applicable shortfall or termination liability**(ies),"** and (2) that the transferor

> "remains jointly and severally liable for any obligations existing as of the Effective Date of the transfer," including "any applicable shortfall or termination liability**(ies)."** Far from "directly confict[ing]" with the plain meaning of "all obligations," therefore, the November 1995 version of § 2.1.8 expressly confirms what was clear in the earlier version: that a transferee had to assume all obligations, including shortfall and termination **obligations,** when traffic was transferred.

283) The November 1995 tariff change does not alter at all the fact that shortfall and termination OBLIGATIONS do not transfer on traffic only transfers. AT&T attempts to confuse the FCC by intentionally making the FCC believe that "**applicable liabilities"** that exist at the time of the transfer are the same as the CSTPII/RVPP plans Shortfall & Termination **obligations**. Liabilities occur when there is **a failure to meet obligations**. There is a major difference. There were no **applicable** liabilities.

AT&T said so itself to the Third Circuit:

AT&T REPLY brief to the Third Circuit: Page 4 paragraph 3:

> Ironically, the CCI Br. (at 32-34 & 36-38) relies on the District Court's finding that the earlier transfer of the **entire plan** from the Inga Companies to CCI did not threaten evasion of shortfall liabilities. See May 19, 1995 Order-at 22-24 (AA 1049-51). **But that is because the shortfall liabilities there followed the traffic,** as **it would not** in the proposed transfer from **CCI to PSE at issue in this appeal**.

284) The same tariff analysis that petitioners have furnished prior regarding all obligations pertain to what is transferred still applies to November 1995. What was added on a **prospective basis** to 2.1.8 in November 1995 was shortfall and termination liabilities that exist --

"were **applicable" at the time of transfer.** Petitioners will detail later why it does not make a bit of difference what obligations are listed in 2.1.8.

285) This was a prospective tariff change so petitioners were not exposed to this; however even if petitioners were exposed to this it wouldn't pertain to petitioners because petitioners plans had no shortfall and termination liabilities at the time of transfer. The plans in fact had already met its fiscal year commitment and were still pre- June 17th 1994 grandfathered as AT&T conceded.

286) AT&T replaced Tr. 8179 with Tr. 9229 and Transmittal 9229, became effective November 9, 1995 **on a prospective basis.** 47 C.F.R. § 61.54 mandates that tariffs contain certain codes and symbols. A copy of the code/symbol key is annexed here at Reply D page 166. The November 2.1.8 tariff change contains the letter **"C"** on the right hand side as part of the tariff revision next to the addition of S&T **liabilities.** As can be plainly seen, adding S&T **liabilities** to Section 2.1.8 was undeniably **a substantial change and, therefore, required a "C" designation**.

287) If the revision was a mere clarification as AT&T incorrectly asserts, the FCC would have permitted AT&T to use the letter **"T"** to signify a change in text **but no change in the rate or regulation.** The November 1995 language change that was made to 2.18 had no affect on traffic only transfers. It did have an affect upon plan transfers that had applicable liabilities on its plan due to failure to meet its obligations **at the time of the plan transfer**. Petitioners were not in danger of meeting its revenue commitment to produce "liabilities" from not meeting commitments.

288) In fact the evidence shows petitioners were not only the largest aggregator but were one of a few that was substantially over commitment. As the exhibit states on the bottom of this version of 2.1.8, it was only **applicable to transactions after November 1995,** and plaintiffs did its traffic only transfer in Jan. 1995.

AT&T Counsel Mr Meade certified to District Court Judge Politan in 1996 exhibit N to initial filing that Tr. 9229 was a **substantive change**.

> The FCC was concerned that the modified language in Section 2.1.8(c) would have had a "broader effect" than was needed to achieve AT&T's specific purpose, which was simply to clarify its existing right to prevent a location transfer intended to avoid payment of charges, and so would constitute **a substantive tariff change**.

289) All substantive tariff changes are prospective under the law. See exhibit N to petitioners initial filing in which AT&T counsel Mr. Meade certified to the District Court that 9229 transmittal which became the November 1995 tariff change had no affect on petitioners:

> Because this is new, it will apply only to newly ordered term plans, and so would **not be determinative** of the issue presented on the CCI/PSE transfer.

290) The FCC's decision was clear that no changes after January 1995 would affect plaintiffs' transaction :(Page 11 para 14 exhibit B to petitioner's initial filing)

> We also do not understand AT&T to argue that **any revisions to its tariff that became effective after January 1995** govern resolution of this matter.

291) There never was a 2.1.8 tariff revision which ever mandated that revenue commitments and S&T obligations transferred on traffic only transfers. That is why

exhibit J to petitioners initial brief (an AT&T 2/23/02 version of the AT&T section 2.1.8 TSA) states that S&T **may** transfer. Yes it would if you do a plan transfer! AT&T's current bogus tariff analysis that all obligations must transfer on a traffic only transfer would dictate that its revised 2.1.8 section in 2002 would have to say "**must**" not "**may**" transfer. Of course **AT&T never addressed this exhibit** because it confirms petitioner's tariff analysis is absolutely correct. Of course AT&T has no evidence to support its bogus theory. No AT&T evidence is all the evidence one needs to see that this is one massive scam AT&T has pulled off over 12 years.

292) The FCC should also note that AT&T claims that November 1995 added 2.1.8(E) section which has no **"C"** for change should not be used to evaluate 2.1.8 ("not controlling argument") but AT&T then states that the November 1995 2.1.8 section which is designated by **"C"** for substantive change and actually states effects transactions after November 1995 should be used for the FCC's tariff interpretation. **In fact it is the opposite- based upon tariff coding symbols!!!** The FCC can clearly see that 2.1.8(E) was a detailed explanation of how 2.1.8 worked in regard to joint and several liability being addressed only on plan transfers. Because 2.1.8E further confirms that shortfall and termination obligations do not transfer on traffic only transfers AT&T states it is "not controlling.

293) The plans revenue commitments and the shortfall and termination obligations are the transferor plan obligations that do not transfer under a traffic only transfer. The tariff does not allow the separation of plans commitments from the plan. The New Customer (PSE) must assume all the obligations that pertain to what the Former Customer CCI and the New Customer (PSE) have agreed to be transferred.

294) The key part of all versions of 2.1.8 in Jan 1995, revised November 1995, and the revised May 1996 version is the **"ANY**" word in the opening of 2.1.8. Then the **new Customer assumes** all the obligations on what that "ANY" amount of accounts is and the new customer reports it to AT&T. It is very important for the FCC not to be misled by what obligations are listed after the phrase in 2.1.8 that says:

These obligations include:

295) Even if all the plan obligations (revenue commitments, shortfall obligations, termination obligations) are listed that does **not** mean that all those obligations get transferred. **It is a complete red herring.** Most people would expect that all the obligations listed after the phrase:

"These obligations include"

would be what obligations are transferred/assumed—not the case in 2.1.8.

In Jan 1995 the only two obligations that were listed were agreed upon for transfer by CCI and PSE; however to fully understand 2.1.8 the FCC needs to see how petitioners correct tariff analysis worked in subsequent 2.1.8 versions. As AT&T counsel explained to the DC Circuit, "all obligations" depend upon what is transferred:

This can be further evidenced by AT&T's May 1996 version of 2.1.8. that lists all the obligations but the transferor still can do a traffic only transfer and the transferor keeps all plan obligations.

See ANNEXED HERE AT EXHIBIT REPLY C page 163

296) Here is the opening:

> 2.1.8. Transfer or Assignment - WATS, including *any* associated telephone numbers, may be transferred or assigned to a New Customer, subject to each of the following provisions:

Here is the smorgasbord list of obligations and the **plan obligations** that were prospectively added to 2.1.8 are bolded and underlined:

> **B.** The New Customer notifies AT&T in writing (using the same Transfer of Service form signed by the Current Customer)* that it agrees to assume all obligations of the Current Customer as of the Effective Date of the transfer. These obligations include, for example: all outstanding indebtedness for the service, the unexpired portion of any applicable minimum payment period(s), **the unexpired portion of any term of service and usage and/or revenue commitment(s), and any applicable shortfall or termination liability(ies).**

297) When you study the prospective May 1996 version of 2.1.8 and focus in **only on paragraph "B"** it appears as if this version does not allow traffic only transfers. It appears that it only allows plan transfers if you were to only look at the obligations laundry listed. Because this 2.1.8 version lists as obligations the entire plans remaining revenue commits, (**the unexpired portion of any term of service and usage and/or revenue commitment(s).** Most transferors/transferees would think that the entire plan had to be transferred and therefore traffic only transfers were not allowed!

298) This is the red herring and the confusion and why AT&T not only fails on the merits but is also in violation of laws which require tariffs to be explicit.

As seen below the May 1996 version of 2.1.8 still allows traffic only transfers!

Traffic Transfer Section:

> (c) The Customer has requested that AT&T **"remove specified locations or telephone numbers from the Pricing Plan"**, and the total annualized charges or usage from the locations or telephone numbers **that would remain under the Pricing Plan** are less than 50% (during

> the first six full billing months of the term of the Pricing Plan), or 85% (after the sixth full billing month of the term of the Pricing Plan), of any **currently applicable commitment under the Pricing Plan**. Such total annualized charges or usage will be determined using the same methodology as specified in (b), preceding.

299) Obviously you can still do a traffic only transfer despite having plan commitments listed within 2.1.8 and the transferor keeps its revenue commitments and the associated S&T obligations!!!! How can that be? Very simple! As petitioners have explained, "**All the obligations that pertain to only what has been selected for transfer are considered from the list**! Since the plan does not transfer on a "traffic only" transfer the plan obligations listed do not pertain. Simple!

300) AT&T's counsel Mr. Carpenter wasn't talking about de minimus transfers he was talking about how 2.1.8 worked for all transfers.

> Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on what's transferred.
> Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on what service is being transferred.

David Carpenter supporting petitioners during Third Circuit Oral Argument:

> We point out in our brief that there's a distinction between transfers of entire plans, and transfers of individual end-users locations. That when the "**plan"** is transferred, **"all the obligations"** have to go along with it. (exhibit V in petitioners initial filing Pg 15 line 9)

See Carpenter again at exhibit V. in petitioners filing Pg 15 line 23…

> When you're transferring **all** the traffic, you're transferring the **plan**. That is –and the obligations have to go with it, shortfall and termination liability.

That's why petitioners did not transfer all the traffic! Petitioners knew what it was doing by the letter of the tariff as Judge Politan noted.

301) AT&T in this May 1996 version of 2.18 attempts to clarify slightly that the obligations laundry list pertains to what is included within the "ANY" amount of the plan by adding "**subject to each of the following provisions"**.

> **2.1.8. Transfer or Assignment** - WATS, including "***any"*** associated telephone numbers, may be transferred or assigned to a New Customer, "**subject to each of the following provisions"**:

Yes, only what is selected for transfer is subjected to the laundry list. If only the accounts are transferred i.e. (traffic only transfer), then the transferee is only subjected to account obligations on those accounts transferred. AT&T wacky analysis that the transferee would be responsible for the bad debt of accounts left on the transferors plan is obviously not permissible, not does it make any sense at all. If the plan was transferring then the plan would be subjected to the plan obligations listed. Additionally, see in 2.1.8 para B: "These obligations include, **for example"** What is being implied here is that these are just "examples" of what obligations may be transferred depending upon what has been agreed upon within the "ANY" amount of accounts selected for transfer. between the Former AT&T Customer and New Customer AT&T Customer. "ANY" could be one, some or most accounts; whatever is specified by the transferor and transferee. **This is the way it works!!! It is still very confusing and that is why the case can be called against AT&T on ambiguity alone.**

302) The May 1996 version of 2.1.8 proves petitioner's 1995 tariff analysis of 2.1.8 is correct. The same tariff analysis hold true for Jan 1995. To further support petitioner's 2.1.8 tariff analysis in 1995 is the fact that even though plan

commitments were not listed within 2.1.8 in **Jan 1995** petitioners still did plan transfers. It was understood that when you did a plan transfer the plans obligations were transferred even though no plan obligations were listed after the phrase: (these obligations include).

303) So plan commitments were "in theory" there but did not come into play because a traffic only transfer was done and not a plan transfer. Likewise, adding additional obligations to the list in subsequent 2.1.8 versions (like Nov. 1995 exhibit P in initial filing and May 1996 here as exhibit Reply C) still didn't change the fact that on"traffic only" transfers the transferors' plan obligations (revenue commitments and the potential for shortfall and termination) did not transfer; never did and still do not today! That is why AT&T has no evidence to support itself.

304) According to AT&T's bogus theory CCI's revenue commitments/S&T obligations **must** transfer to PSE on a traffic only transfer. See the 2.1.8 version which became effective 02/23/02 at exhibit J in petitioner's initial filing)

> The AT&T Transfer of Service Agreement "**may" require** the new Customer to **assume all of the current customer's obligations** and the current customer to remain jointly and severally liable for any obligations relating to the pre transfer period.

305) AT&T didn't change section 2.1.8 to go from must transfer in 1995 to may transfer in 2002. The requirements under AT&T Transfer of Service were substantially increased as time went on not decreased. The list of obligations after the phrase: "These obligations include" is **totally meaningless.** Whether the obligations are listed or not they pertain only to what (traffic or plan) is transferred. The bottom line if an AT&T customer does a traffic only transfer than all account

obligations must be transferred. If a plan is transferred then additionally all the Customer plan obligations transfer also transfer. Very simple!

XXII On a Traffic Only Transfer AT&T Places Deposit Requirements on the Transferor (Not Transferee) Because the Transferor Keeps the Revenue Commitments /S&T Obligations

306) Conclusive evidence that plan commitments do not transfer on traffic only transfers is seen within the May 1996 version of 2.1.8, as AT&T required the TRANSFER**OR** to increase the deposit requirement--- NOT the transfer**ee**.
Of course AT&T wanted to put the increased deposit requirements on a "traffic only" transfer on the transfer**or**, because that of course is the party that keeps the plan commitments! As you can see the **revenue commitments and shortfall obligations remain on the transferors plan under the traffic transfer section**. Checkmate!

307) Obviously if shortfall and termination obligations transferred to the transfer**ee** then AT&T would have required the transfer**ee** to increase its deposit requirements on its plan commitments. All tariff sections (3.3.1.Q bullet 6, 8, 10,) and section 5 all support petitioner's tariff analysis and all of these other sections conflict with AT&T's bogus theory. So even though all obligations are listed none of them transfer on a traffic only transfer. There is no other way to make sense of 2.1.8 other than petitioner's analysis. All other tariff provision all support petitioners analysis. No tariff provisions support AT&T!

XXIII The Law of The Case

The Case Was Over When The DC Court Ruled

308) AT&T asserts on page 23 paragraph 1:

> More basically, any suggestion that the D.C. Circuit has **determined-by default** or otherwise-what obligations transfer on a traffic transfer flies in the teeth of the Court's express ruling. The Court stated that "[w]e ... do not decide precisely which obligations should have been transferred in this case." D.C. Circuit Opinion at I 1 (emphasis added). See also id, at 11 n.2 (noting that the interpretive import of § 2.1.8's "including" sentence "is beyond the scope of this opinion"). Petitioners' attempt to derive a default interpretation from the Court's ruling is thus entirely improper.

Petitioners point is valid. Although the FCC used section 3.3.1.Q bullet 4 to determine how accounts could transfer, the FCC used section 2.1.8 to determine which obligations transfer on traffic only transfers. Section 2.1.8 is the **only section that has a joint and several liability section on transfers therefore the FCC had to utilize 2.1.8 to interpret and determine which obligations transfer. Section 3.3.1.Q's general provisions do not even have any obligations transferred language**. The FCC agreed with Judge Politan's non vacated District Court Decision as to the allocation of where the obligations go on a traffic only transfer under 2.1.8.

309) AT&T position in the non vacated decision was the petitioners were not jointly and severally obligated on a traffic only transfer. This conclusively means that S&T obligations did not transfer. The question of which obligations transfer was answered by the District Court and AT&T and all parties agreed. AT&T's position (which under the doctrine of judicial estoppel can not be changed) and was the Law of the Case, stated by District Courts non vacated May 19th, 1995 Order at 6:

> Moreover, as AT&T's customers for all of the locations and all of the

> traffic generated under the tariffed plans, in terms of the ***transfer*** **of such accounts** the Petitioners would, **but for** the attempt to bifurcate the traffic from the **underlying plans**, **remain jointly and severally liable** with the new customer for all obligations existent at the time of the transfer.

310) The fact that petitioners were not jointly and severally liable under 2.1.8 confirms S&T obligations do not transfer. Therefore when the FCC agreed with Judge Politan's decision regarding the allocation of obligations the obligations issue was resolved. When the DC Circuit answered Judge Politan's referral on how the accounts could move the case was over due to the obligations issue having already been decided by both the non vacated District Court, then not changed by the FCC, and not changed by the DC Circuit. It became what is referred to as **The Law of the Case.**

311) The Law of the Case designates that if an appellate court has not decided a legal question and case goes to a lower court for further proceedings**, the legal question, not determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same.** *Allen v. Michigan Bell Tel. Co.*, 232 N.W.2d 302, 303.

312) The Law of The Case also provides that an appellate court's determination on a legal issue is binding on both the trial court and FCC **and an appellate court on a subsequent appeal** given the same case and substantially the same facts. *Hinds v. McNair*, 413 N.E.2d 586, 607.

313) The facts are exactly the same as it relates to the FCC's use of 2.1.8 to interpret and determine the proper allocation of obligations. The only change is in reference to how accounts could transfer, and since the FCC did not appeal the DC Circuit because the FCC saw where it went wrong on the "how to" side of the equation, that did not diminish or effect the FCC's proper interpretation on the obligations allocation question. The FCC having already agreed with the non vacated District Court on its obligations allocation analysis and the DC Circuit not having decided the obligations issue has under the Law of the Case decided the only remaining DC Circuit issue. When the DC Circuit correctly determined that 2.1.8 does allow traffic only transfers as well as entire plan transfers the totality of petitioners 2.1.8 traffic only transfer was answered. By law the case is over and petitioners prevail. The reason why TA&T has been so adamant in trying to convince the FCC that it didn't use 2.1.8 is that AT&T knows the case is over by showing that 2.1.8 was used. Section 2.1.8 was clearly used and legally the case is history.

314) The DC Circuit obviously answered the question that 2.1.8 allows traffic transfers that originated in the District Court and then further referred by the Third Circuit. The original question was:

> whether section 2.1.8 [of AT&T's Tariff FCC No. 2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction.

DC Circuit Decision (exhibit B to initial petitioner's filing) clearly answered this question:

I) DC Court Decision Pg. 11:

> In sum, the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 does not apply to a transfer of "traffic."

II) DC Court Decision page 8

> Absent such reliance, the commission provides us with little reason why the plain language of Section 2.1.8 fails to encompass **transfers of traffic alone**.

III) DC Court Decision Pg.10:

> As the foregoing discussion indicates, we find the Commission's interpretation implausible on its face. First, the plain language of **Section 2.1.8 encompasses all transfers of WATS, and not just transfers of entire plans.**

IV) DC Court Decision page 2:

> We conclude that **traffic is a type of service covered by the transfer provision**, and that the Commission's contrary interpretation would render the provision meaningless.

V) DC Court Decision: Pg. 9:

> Be that as it may, proceeding by analogy does not change the fact that CCI and PSE did request a *transfer*- a transaction on its face at least potentially **within the reach of section 2.1.8,** which governs "Transfer or Assignment"

315) The following are additional evidence from the record showing parties understanding that petitioner's traffic only transfer was done under 2.1.8 and all requirements met:

I) Inga original 2003 DC Circuit Joint Appendix. pg 48:

> The parties agree that the transfer would be governed by AT&T tariff FCC NO. 2 **Section 2.1.8**

II) Exhibit F shows 9 AT&T (TSA's) used to effectuate the traffic transfer that, are all **verbatim 2.1.8**. If petitioners used 3.3.1.Q bullet 4, petitioners would use AT&T Add /Delete forms, as the one at 2003 DC Circuit Joint Appendix pg. 504. Petitioners used TSA's to apply 2.1.8.

III) Inga 2003 DC Circuit Joint Appendix 446 Para. 53

> In fact the tariff and AT&T's own form, the Transfer of Service or Assignment (TSA) form, made it possible. We did an assignment of end-user accounts **as per the tariff** and what had been commonly accepted in the marketplace for years.

IV) Inga DC Circuit Post Oral brief page 4 para 5:

> The FCC's view of the transaction hinges on section 3.3.1.Q of AT&T's tariff. It has **always been Intervenors position that section 2.1.8** expressly allows for the transaction intended in transferring the accounts to PSE.

V) District Court Politan Decision (2003 DC Circuit Joint Appendix 61-62):

> The manner in which such a transfer is carried out is by the submission of a Transfer of Service Agreement and Notification form ("TSA"), executed by both parties to the transfer to AT&T.

VI) Before the D.C. Circuit, AT&T's brief stated

> CCI's use of "Transfer of Services Agreement" forms to request the pertinent movement of traffic conclusively established that Section 2.1.8 applied to their request.

VII The FCC recognized petitioners **request** was under 2.1.8 which it believed was the wrong section but ruled in our favor: FCC Ruling: Exhibit B page 6 in initial petitioner's filing:

> We conclude that **section 2.1.8** of AT&T's tariff did not address or govern CCI's and PSE's **request** and that its respective tariffs with CCI and PSE permitted the movement of traffic at issue here.

316) All parties clearly understood petitioners request was under 2.1.8. AT&T's position which it is judicially estopped from changing had been that petitioner's plans would not be jointly and severally liable for shortfall and termination obligations, they would remain actually liable for those obligations. Therefore, given the fact that the FCC used 2.1.8's joint and several liability language and 3.3.1.Q bullet 4 does not contain such jointly and severally liable language both questions were answered in petitioners favor. Therefore when the DC Circuit ruled the case was over. Obviously at the time the DC Circuit did not realize it but the tariff evidence conclusively shows that by default the issue was resolved by the DC Circuit.

XXIV What CCI –PSE Wanted to Do Was Permitted Under The Tariff

317) AT&T questions the CCI –PSE contract. Page 23 -24 the 7th line from bottom on pg. 23:

> In one passage, the Commission summarizes "a letter agreement between CCI and PSE" that explains how these two entities intended to structure the transfer. See Commission 2003 Decision, 19 n.51 (quoted in the Petn. at 15). This summary simply describes what CCI and PSE wanted to do, not what they were legally permitted to do under the tariff. Moreover, the two features of the proposed transfer that petitioners quote from this summary-that CCI would remain responsible for its commitments under the plan and that PSE would assist in moving accounts to enable CCI to meet those commitments-**say nothing whatever about the commitments, or obligations, that PSE had to assume.**

As usual AT&T is wrong. The record clearly shows what CCI/Inga transferred and what PSE assumed. Both parties understood that the minimum payment period

and the indebtedness would go to the PSE. The PSE RVPP pool would be debited as per 3.3.1.Q bullet 6 & 8. PSE's cover PSE's bad debt as the non vacated Politan Decision noted and the FCC agreed.

318) The cover letter from PSE which is exhibit F to petitioner's initial filing explained that it was a "proper" transaction. Also exhibit F to petitioner's initial filing shows PSE's manager Pat Bello explaining that it had to secure the account obligations. AT&T which is desperate for a defense now attempts 12 years too late to assert bogus defenses that are simply not there.

XXV The FCC Absolutely Determined What Obligations PSE Assumed As it Agreed With The District Courts Non Vacated Decision

319) AT&T again asserts page 24 para 1:

> In stating that CCI, "but not PSE, would continue to have been responsible any shortfall obligations," id. ¶ 11, the Commission was once again simply describing the transfer that CCI and PSE were proposing. Similarly, in observing that termination obligations were not at issue, id. ¶ 10 n.56, the Commission was simply noting the fact that termination obligations had not been triggered because the plans at issue had not been terminated. **In neither passage did the Commission state what obligations § 2.1.8 required PSE to assume**.

AT&T is again playing a game of requiring the FCC to have to say that PSE is not assuming S&T obligations as well as saying CCI is keeping S&T obligations. **By the FCC stating that CCI as well as the Inga Companies continue to be responsible for the S&T obligations**, the FCC is likewise confirming that PSE does not assume S&T obligations on a traffic only transfer. There are **not** two sets of S&T obligations that CCI has. Either CCI keeps the S&T obligations on its traffic only transfer or it

transfers them. It is comical that AT&T is expecting that the FCC Decision needed to state both sides of the coin. According to AT&T on a coin flip the referee should yell heads up AND tails down! AT&T is making a complete mockery of these proceedings challenging certainties.

320) AT&T again asserts:

> Indeed, in these passages the Commission manifestly could not have determined the scope of § 2.1.8's requirements, **because in the immediately preceding paragraph it had ruled that § 2.1.8 did not apply to this transfer at all**. As Judge Bassler recognized, because the Commission **"only discussed shortfall and termination charges in the context of the fraudulent use provision**," it "did not determine ... whether PSE was required to assume those commitments under § 2.1.8, because it had already determined that § 2.1.8 did not apply."

Because the FCC used 3.3.1.Q bullet 4 to determine how the accounts could transfer but used section 2.1.8 to determine which obligations transfer AT&T is again **linking the paragraphs** to create confusion.

321) AT&T's statement on pg. 24 para 2:

> only discussed shortfall and termination charges in the context of the fraudulent use provision

This ridiculous statement would make one believe that there are **two sets** of shortfall and termination obligations under the tariff; one set to determine fraudulent use and a second set to determine which obligations are allocated to PSE and CCI ----and the second set was never interpreted! There are one set of obligations!

322) The FCC's 2003 Decision on the allocation of obligations agreed with the District Courts first **non vacated** Decision which used section 2.1.8 to interpret and determine the obligations allocation between CCI/Inga and PSE.

The FCC's Decision under the heading of **2.1.8** (Not the Fraudulent Use Heading as AT&T misrepresents and Judge Bassler was in obvious error) stated as to the obligations allocation:

323) FCC Page 7 line 10 exhibit B to petitioner's initial filing.

Under the FCC's Heading **Section 2.1.8**

> **CCI and PSE retained the benefits and obligations of their respective agreements with AT&T.** We note in this regard that both the forms submitted to AT&T and the agreement between CCI and PSE stated that CCI would continue to subscribe to its existing CSTP II plans. **[FCC FOOTNOTE 49 HERE]** Thus, **CCI still would have to meet its tariffed commitments**, without the use of the traffic moved to PSE, and **AT&T also would remain obligated to CCI under the terms of Tariff No. 2**. **[FCC FOOTNOTE 50 HERE]** The moved traffic would be used to meet PSE's CT 516 volume commitments and, once moved, would no longer be associated with CCI's CSTP II. If the traffic were moved away from CCI under Tariff 2, to PSE under Contract Tariff 516, AT&T would get less money for the same traffic – the traffic would be discounted 66 percent instead of 28 percent. **[FCC FOOTNOTE 51 HERE]**
>
> **FOOTNOTE 49:**
> *See* Exhibits G and H to Petition.
>
> **FOOTNOTE 50:**
> CCI and PSE did agree that the traffic could be returned to CCI upon 30 days written notice from CCI that **AT&T required CCI to meet its commitments**. *See* Exhibit G to Petition. Accordingly, at least theoretically, the traffic might have been returned to CCI at some point to **enable it to meet any CSTP II obligations**. *Cf.* Reply at 10 (arguing CCI would receive more net income, and thus have more money available to pay any charges, after the traffic was moved to PSE). We do not speculate whether the traffic ever would have been moved back or whether it or some other development would have satisfied CCI's **CSTP II commitments** because AT&T did not move the traffic from CCI to PSE.
>
> **FOOTNOTE 51:**
> ***See First District Court Opinion* at 5.** Exhibit G to the Petition, a letter agreement between CCI and PSE dated January 16, 1995,

> explains that, once the traffic was moved: (1) CCI's end-users (formerly the Inga Companies' end-users) would "**be billed by AT&T at the prevailing AT&T Tariff 2 CSTP rates, less twenty three percent (23%) Customer Specific Term Plan (CSTP) discount, and 5.5% Revenue Volume Pricing Plan (RVPP) discount**"; (2) CCI would get 80 percent "earned credit" for this traffic **from PSE**; (3) **CCI would continue to be responsible to AT&T for any commitment associated with the CSTP II Plans (which would not be discontinued);** and (4) PSE would assist in moving accounts back to CCI upon written notice from CCI that AT&T required **CCI to meet its commitments.** *See* Exhibit G to the Petition. Thus, the traffic would be discounted 66 percent instead of 28 percent and the end-users would receive a discount off AT&T's standard tariffed rates greater than the portion of the 28 percent they had received when their traffic was associated with the CSTP II plan. ***See First District Court Opinion* at 3-5**. The discount differential would be apportioned between CCI and PSE according to their letter agreement. *See also* n.**Error! Bookmark not defined.**, *infra*.

The above section 2.1.8 tariff analysis under the 2.1.8 heading references and agrees with the

non vacated First District Court Decision and both utilized section 2.1.8 to interpret the obligations allocation. The above analysis shows that "once the traffic was moved" to PSE the end-users transferred would get PSE's 28% (CSTP 23% plus 5% RVPP) discount pool which absorbs the bad debt. The S&T obligations stay with the plan holder CCI which obviously means PSE does not receive them. When the FCC Decision is issued make sure it says that shortfall and termination obligations stay with the plans revenue commitment on CCI's plan and **this means AT&T that PSE does not assume these commitments**. AT&T's mandating that the FCC have to tell AT&T the converse is simply a mock on the FCC and it shows how desperate AT&T has become for a defense.

323) Look at this next FCC decision excerpt which does fall under the Fraudulent Use Heading but references the use of section 2.1.8.

FCC 2003 Decision Page 8 para 11 Under Fraudulent Use Section:

> Based upon our review of AT&T's tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff – which we do not decide – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE. If AT&T had moved the traffic from CCI to PSE, then all of the traffic that CCI had used to meet its CSTP II/RVPP commitments would be associated with PSE's CT 516. **Further, CCI (as well as the Inga companies) [FOOTNOTE 62] but not PSE, would continue to have been responsible for any shortfall obligations under the CSTP II/RVPP plans.** Once all of its traffic was moved to PSE, CCI might have needed to amass new traffic in order to meet its commitments under its CSTP II plans. **AT&T's apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question.**
> **FOOTNOTE 62:**
> ***See First District Court Opinion* at 9.**

324) The FCC was making the point to AT&T that its fraudulent use claim was a farce because under **section 2.1.8's** joint and several liability provision **CCI AS WELL AS THE INGA COMPANIES** would be obligated for the actual shortfall. AT&T was claiming that CCI was an asset less shell and therefore was attempting to enact its Fraudulent Use provisions; however the FCC was stating that AT&T also had the Inga Companies to pursue for shortfall. This is why the FCC correctly chose to further explain 2.1.8's obligations allocation under Fraudulent Use. It makes perfect sense.

Furthermore look at the sentence:

> Further, CCI (as well as the Inga companies) **[FOOTNOTE 62]** but not PSE, would continue to have been responsible for any shortfall obligations under the CSTP II/RVPP plans.

See what it the footnote references:

> **FOOTNOTE 62:**
> ***See First District Court Opinion* at 9.**

325) The FCC was in agreement with Judge Politan's non vacated Decision which interpreted the obligations allocation **under 2.1.8.** The fact that the FCC included a small part of the 2.1.8 obligations analysis under the fraudulent use heading is appropriate to those who understand the joint and several liability provision of 2.1.8. AT&T understands it but is playing dumb.
The FCC was simply making the point that revenue commitments/S&T obligations do not transfer on traffic only transfers but AT&T still could pursue both CCI and the Inga Companies. By AT&T making a claim for fraudulent use because it "believed" that it was going to be deprived of shortfall on CCI's plans, AT&T was also simultaneously confirming, as was the FCC, that it understood that S&T obligations do not transfer on traffic only transfers.

326) The FCC obviously was confirming that S&T obligations stay with CCI, and the fact that part of its 2.1.8 obligations allocation analysis was under the heading interpreting AT&T's bogus Fraudulent Use claim is perfectly understandable, and in no way diminishes its correct interpretation.

327) In fact it actually enforces the FCC decision regarding the allocation of obligations because it confirms the FCC understands that for AT&T to make a fraudulent use claim it also had to acknowledge the S&T obligations did not transfer on traffic only transfers. If the tariff did not allow traffic only transfers in which the S&T obligations stayed with the transferor, AT&T would not have instituted its bogus fraudulent use claim; it would have simply argued that its

tariff does not permit S&T obligations to remain with the transferors plan on a traffic only transfer.

328) Why would AT&T need to bogusly claim fraudulent use if 2.1.8 did not permit the transaction as ordered by petitioners; it wouldn't. It can't be considered a second line of defense. In this case when AT&T instituted the "second line" of defense, AT&T automatically declared that its first line of defense is totally bogus.

329) Likewise if the partial traffic only transfer was not done, as Judge Politan stated "to the letter of the law," why would AT&T ever settle with CCI; a company AT&T refers to as an assetless shell? Despite AT&T being under a non disclosure agreement with CCI AT&T wrote the following on Jan 30th 2004 to the District Court:

> Pursuant to that settlement agreement, CCI terminated all of its plans with AT&T and released AT&T from all claims. In exchange, **AT&T agreed to forgive millions of dollars** of shortfall, termination, and other charges that were owed by CCI to AT&T under those plans and to make a **settlement payment to CCI.**

330) AT&T didn't explain in its letter to Judge Bassler that CCI as part of the settlement agreement was mandated by AT&T to help AT&T defend itself against the Inga Companies continued claims. If AT&T's actions were permissible why would it: A) waive tens of millions of dollars in shortfall that it claimed was permissible at the time and B) make a settlement payment to CCI to boot C) then be concerned about the Inga Companies continued claims about what AT&T "states" is a transaction its tariff does not allow. Does AT&T really believe that

anyone believes AT&T's "millions of dollars of shortfall" are for real? AT&T just threw in a cash settlement payment on top of the shortfall waiver, just because it was in a charitable mood.

XXVI AT&T Actually Attempts to Tell the FCC What The FCC Meant in the FCC's Brief to the DC Circuit

331) AT&T again asserts on page 25 line 4:

> Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself

Due to the clear evidence that the FCC utilized 2.1.8's joint and several liability obligations language clearly shows that the FCC interpreted within the 2003 Decision that S&T obligations stay with CCI. The FCC used the same basis in its brief to the DC Circuit that it had used in the 2003 Decision. The FCC also used referenced the tariff analysis of the District Court which also stated its own decision also utilized the obligations language of section 2.1.8.

AT&T challenges the FCC's brief to the DC Circuit on pg 26 para 1 tenth line:

> Nor did agency counsel argue that the Commission had given "**meaning**" to § 2.1.8 by ruling that it does not require the transfer of shortfall and termination obligations in traffic-only transfers.

332) AT&T is deliberately mixing apples and oranges again confusing the fact that the FCC used 3.3.1.Q bullet 4 to determine how the accounts could move vs. being forced to use section 2.1.8's language to interpret which obligations transfer. AT&T is referencing the following FCC statement:

> a transfer of traffic and a transfer of plans yields identical benefits and burdens to AT&T and its customers. **That is not the case**…Thus, each method of structuring the transaction presents distinct benefits and obligations for both

AT&T and the customer, and the Commission's reading gives **meaning** to section 2.1.8.

333) The FCC was stating to the District Court that the only meaning that 2.1.8 had was due to 2.1.8's obligations language. Because the FCC believed that the way you transfer "traffic only" was as a delete and add as per 3.3.1.Q bullet four, the FCC is actually stating: In regards to traffic only transfers, if it wasn't for the obligations language there would be no meaning to 2.1.8 as far as traffic only transfers are concerned. Because the FCC used 2.1.8's obligations language to determine a "traffic only" transfer, that is the only meaning i.e. "use for", 2.1.8.

334) The FCC believed that if it weren't for the obligations language in 2.1.8 (which the FCC was forced to use by default) there would be no meaning to 2.1.8; but because the FCC used 2.1.8 to interpret which obligations transferred, 2.1.8 had meaning. AT&T again is confusing the FCC's erroneous position of "how" the traffic could be bulk transferred with the FCC's correct interpretation as to which obligations transfer under a traffic only transfer. It is important to note that petitioners explained in detail to the District Court that although the FCC used one section of the tariff (3.3.1.Q.4) to interpret movement of accounts vs. another section 2.1.8 to determine which obligations transfer there was no detrimental effect to AT&T. The FCC error on how the traffic could move had no relation to the FCC's correct interpretation of 2.1.8's obligations language. AT&T never refuted petitioners "no harm" position and could not come up with a reason how it was harmed by the FCC's use of two different sections of the tariff.

XXVII Transmittal 8179 and AT&T's Substantial Cause Pleadings

335) AT&T asserts on page 26 para 2:

> Petitioners also claim that the Commission rendered a definitive interpretation of the phrase "all obligations" when the staff considered revisions that AT&T proposed to § 2.1.8 in Transmittal 8179.

FCC notes obtained under the Freedom of Information Act (FOIA), here as exhibit K to petitioner's initial brief showing that AT&T went to the FCC upon petitioners' Jan 1995 traffic transfer and spent weeks proposing several different changes to 2.1.8 that would mandate that when there were a certain amount of accounts transferred, the plan had to be transferred. In any event all these proposals would be grandfathered as each states at the bottom:

> This Section F. applies only with respect to volume or term plans or Contract Tariff subscriptions that were not in effect prior to <<TED>>".

<<TED>> means term end date, so existing plans would be grandfathered.

336) AT&T finally settled on a tariff change and in its substantial cause pleading to the FCC argued for retroactive provisioning of its newly created transmittal 8179, see exhibit L to petitioner's initial brief.

Tr. 8179 was specifically designed by AT&T to mandate that when a substantial amount of the traffic was transferred that AT&T treat the transaction as a plan transfer in which S&T obligations transferred; not a traffic transfer in which S&T obligations do not transfer. AT&T was **attempting to change the status quo** of 2.1.8.

337) So while AT&T's Joyce Suek and Charles Fash were telling petitioners that 2.1.8 did not allow for traffic only transfers, AT&T was acknowledging with the

FCC that 2.1.8 did in fact allow traffic only transfers and AT&T was seeking to **retroactively** prohibit petitioners' traffic only transfer.

338) The (FOIA) notes show the FCC's position was that AT&T's retroactive argument was nonsense:

> Finally, **SC** says AT&T should not have to grandfather existing customers as it gets different admin rules based on only when entered into the term plans and that developing and implementing such rules would create needless regulatory complexities with attendant costs and delay. But this does not make sense. (See exhibit M to petitioners initial filing) (The **SC** stands for Substantial Cause Pleading)

339) AT&T's filing of Tr. 8179 shows AT&T attempted to change the status quo of 2.1.8, to mandate that substantial traffic transfers would require the plan and its revenue commitments (i.e. shortfall and termination obligations) to be transferred; whereas normally S&T obligations do not transfer. There was no option proposed by AT&T that would allow the plan to remain, transfer the actual S&T obligations, (leaving zero actual obligations) and then having only the joint and several liability obligations remain, as AT&T bogusly claims 2.1.8 mandates.

The tariff does even permit S&T obligations to transfer away from the transferors CSTPII/RVPP plans on a traffic only transfer, which is why under proposed tariff change Tr. 8179 that was not even an option proposed by AT&T.

340) There are only options: Entire plan transfers or traffic only transfers. If in Jan.1995, when proposing Tr. 8179, AT&T had actually believed (that traffic transfers with S&T obligations and the CSTPII plan remains with zero actual obligations despite still having accounts remaining on its plan) then AT&T would

have obviously proposed that scenario as an option in 1995. AT&T's filing of Tr. 8179 shows it acknowledged that 2.1.8 allows both traffic only as well as plan transfers and plan obligations stayed with the plan. AT&T's position as evidenced by the cites petitioners provided show that prior to the 2003 FCC decision AT&T understood petitioners traffic transfer as per the tariff would maintain the plan commitments with the plan.

XXVIII AT&T Conceded that it Lost its Substantial Cause Pleading to Retroactively Change Section 2.1.8 When It Introduced Tr. 8179

341) Richard Meade certified to the District Court conceding that AT&T lost its Substantial Cause hearing to retroactively change the tariff as the FCC determined that traffic only transfers do not require S&T obligations to transfer.

Richard Meade certified to the District Court.

> The FCC was concerned that the modified language in Section 2.1.8(c) would have had a broader effect than was needed to achieve AT&T's specific purpose, which was simply to clarify its existing right to prevent a location transfer intended to avoid payment of charges, and **so would constitute a "substantive tariff change".** (Exhibit N page 4 para 9 to petitioners initial filing.

342) Yes in deed the FCC advised AT&T that it was a substantive tariff change and as such would not be retroactively provisioned if AT&T did not withdraw it. Yet another concession came from AT&T counsel Mr. Carpenter. Mr Carpenter admits that AT&T had been told by the FCC during AT&T's Substantial Cause Pleading that mandating that substantial traffic transfers be treated as plan transfers where S&T obligations must transfer would be a substantial tariff change to 2.1.8, so AT&T withdrew 8179 because it would have no effect on petitioners traffic only transfer. Additionally if it went into effect prospectively it would have further confirmed for Judge Politan that the traffic transfer was permissible. If AT&T had

allowed it to take place prospectively AT&T wouldn't have been able to delay the case as Judge Politan noted in his decision in March 1996.

343) AT&T's counsel David Carpenter confirmed that the FCC rejected AT&T's Substantive Cause Pleading to retroactively apply 2.1.8 to petitioner's traffic only transfer.

Third Circuit Oral Pg 43 exhibit O in petitioners' initial filing. AT&T's Counsel David Carpenter:

> The FCC asked us to withdraw the complaint because the FCC thought we had done **more in the tariff language than codify** what the tariff already meant because it went beyond prohibiting these sorts of transfers of plans that would affect transfers of individual locations.

334) Judge Bassler also understood that the change was prospective only and would have no effect on plaintiffs:

> After Judge Politan's May 2005 ruling, however, **AT&T withdrew transmittal 8179 purportedly after the FCC advised AT&T that the transmittal would have prospective effect only**. On October 26, 1995 it filed a second transmittal offering proposed revisions to clarify six of AT&T's tariffs.

AT&T was attempting to change the status quo that S&T obligations do not transfer on traffic only transfers. Mr. Carpenter's statements to the Third Circuit also directly coincide and support Mr. Meade's statements that the FCC rejected AT&T's requests.

335) FCC 2003 Decision pg 11 fn 73 exhibit B to petitioner's initial filing:

> As we discuss in Section **Error! Reference source not found.**, below, a tariff transmittal is a carrier-initiated document which, if not withdrawn or deferred by the carrier, or **suspended or rejected by the Commission,** becomes effective, *i.e.*, modifies the tariff, within a certain number of days from the transmittal filing date. *See* 47 U.S.C. § 203(a), (b); 47 C.F.R. § 61.58(a), (b). Until the transmittal becomes "effective" it is not part of the tariff. In the interim, the carrier has the power to defer the effective date of a particular transmittal, file an amended version of it, or, as AT&T did in this matter, withdraw it.

336) If AT&T did not withdraw Tr. 8179 the FCC was going to suspend or reject it. Faced with adverse determination from the FCC, AT&T withdrew transmittal 8179. Transmittal 8179 was designed to do exactly what AT&T wanted but the FCC was not allowing it and told AT&T so; therefore AT&T withdrew 8179.

AT&T comments on Mr Meade's and Mr. Carpenter's obvious concessions that the FCC rejected 8179 due to that fact it attempted to transfer S&T obligations when a traffic only transfer was ordered.

AT&T asserts on page 28 line 2:

> Neither of the foregoing statements remotely suggests that AT&T withdrew Transmittal 8179 because the Commission staff had concluded that the phrase "all obligations" did not include a transferor's shortfall and termination obligations.

337) The FCC absolutely did conclude that all obligations on traffic only transfers do not include shortfall and termination charges. The FCC advised AT&T that if it didn't withdraw the transmittal the FCC was going to reject it. AT&T needed to further delay Judge Politan at the District Court so AT&T then withdrew the transmittal.

338) AT&T fails to quote its counsel Mr. Meade regarding AT&T's **initial attempt** to prevent petitioners from temporarily transferring the traffic only to PSE while the actual S&T obligations remain on the plans. AT&T plays the con in its brief as if Mr. Meade initially only sought to **obtain deposit requirements** on transferor's plans. It was transmittal 8179 that was about to be rejected by the FCC. Transmittal 8179 after being rejected by the FCC was replaced with transmittal 9229 by AT&T as Judge Politan's opinion detailed.

339) Tr. 8179 was designed to do exactly what AT&T wanted. It would have mandated that when a large traffic transfer was done that the plan had to be transferred; not just the traffic. There was no reason to withdraw Tr.8179 unless based upon the FOIA notes, (at exhibits M and K in initial filing)

340) For AT&T to sit here today and try to convince anyone that the FCC didn't fully interpret Tr. 8179 and the affect it had on the obligations language in 2.1.8 is a complete joke. AT&T withdrew Transmittal 8179 and replaced it with Transmittal 9229 because the FCC would not retroactively modify it to prevent substantial traffic only transfers that allowed S&T obligations to remain with the transferors CSTPII plan.

341) To follow Mr. Meade references what AT&T's perceived problem was with 2.1.8 as it existed in Jan 1995:

AT&T Counsel Meade certified:

> On October 26th 1995, AT&T Corp. filed Tariff Transmittal No 9229 with the FCC. Transmittal No 9229 addresses the problem implicated in the CCI-PSE transfer--- **the segregation of assets (locations) from liabilities (plan commitments)** --- in the following manner. See exhibit N pg.7 para 15 to petitioners initial filing.

Well before the Oct 26th 1995 certification AT&T counsel Richard Meade stated in a February 16, 1995 letter to the FCC's David Nall:

> AT&T is filing "at this particular time" to prevent a transaction that (at the minimum) elevates form over substance in an effort to avoid payment of shortfall charges.

342) Mr. Meade conceded that petitioners followed the correct "form" (i.e. correctly followed procedures of 2.1.8 by transferring indebtedness and minimum payment period in accordance with 2.1.8's obligations) but AT&T also bogusly claimed fraudulent use due to the amount of accounts that were transferred and sought 8179 to retroactively change its tariff.

343) It was transmittal 8179 that was first rejected and what Mr. Meade is referencing in above two Quotes. The FCC absolutely did evaluate the phrase "all obligations" as well as the rest of 2.1.8's language.

AT&T's Counsel David Carpenters statement to the Third Circuit Oral Pg 43 exhibit O in petitioners' initial filing is referring to an AT&T proposal that **would affect transfers of individual locations:**

> The FCC asked us to withdraw the complaint because the FCC thought we had done more in the tariff language than codify what the tariff already meant because it went beyond prohibiting these sorts of transfers of plans that **would affect transfers of individual locations.**

345) Tr. 8179 would affect the transfer of locations, but increasing the deposit requirements on the transferors CSTP/RVPP plan would NOT affect the transfer of individual locations i.e. the traffic of end-users.) Increasing the deposit on the transferor (CCI/Inga), which under the tariff had to keep its S&T obligations on its plans, would decrease only the potential that an aggregator which was looking to transfer accounts with NO intention of ever taking the accounts back because it would lose the increased deposit under transmittal 9229.

346) The increase in deposits however did not control under the tariff the ability of the aggregator to still transfer as much of its base as it desired while managing its commitments that remained with the CSTPII/RVPP plan. However, Transmittal 8179 mandated that when a substantial percentage of the traffic was transferred AT&T would mandate the entire plan would have to transfer which in that case meant the S&T obligations would have to transfer because it would be a plan transfer not a traffic only transfer.

347) What Mr. Carpenter had to be referring to that "the FCC thought we had done more in the tariff language than codify" was transmittal 8179, which did indeed evaluate 2.1.8's all obligations language, not the deposit requirements under 9229. Likewise when Mr. Meade certified to the District Court:

> The FCC was concerned that the modified language in Section 2.1.8(c) would have had a broader effect than was needed to achieve AT&T's specific purpose, which was simply to clarify its existing right to prevent a location transfer intended to avoid payment of charges, and **so would constitute a "substantive tariff change".** (Exhibit N page 4 para 9 to petitioners initial filing.

348) The substantive change was the TR 8179 transmittal that evaluated 2.1.8's all obligations language. The FCC rejected AT&T's attempt to change the status quo that S&T obligations stay with the transferors plan on substantial traffic only transfers. Furthermore the FCC did not reject AT&T's request to increase deposit requirements as that was later added to the tariff on a prospective basis. So there was only one possible transmittal that both Mr. Carpenter and Mr. Meade were referring to as the FCC rejecting and that was Tr. 8179 which obviously evaluated 2.1.8's obligation language.

349) AT&T also attempts to deceive the FCC by stating that Tr. 8179 was a proposed tariff language change to section "C" of 2.1.8 not to section "B". AT&T is trying to pull another "fast one" over on the FCC. AT&T has asserted that the tariff change that AT&T sought to enact retroactively (Transmittal 8179) would have been added to 2.1.8 under paragraph "C" and not "B" and that this would have no affect on the obligations language under paragraph "B". Again, AT&T's assertion is total nonsense.

AT&T also attempted to con the District Court when it stated:

> In short, it was the proposed change to subsection "**C**" that the FCC believed "would" constitute a substantive tariff change," id at 4 para. 9 not the addition of an express reference to shortfall and termination obligations in subsection **B**.

350) AT&T incredibly asserted that if the Tr. 8179 went into effect as paragraph "C" under 2.1.8, it would have had no impact on para. "B" and its all obligations

language because they are two "*different"* paragraphs of 2.1.8. Absolute nonsense! The proposed Transmittal 8179 was an amendment to 2.1.8, that was not allowed by the FCC, but if passed would have changed the status quo of 2.1.8 B, and would have required S&T obligations to be transferred on substantial traffic only transfers. The proposed retroactive addition of para "C" would have obviously directly affected 2.1.8's para. "B"s obligations language for substantial traffic only transfers. **AT&T was attempting to place an automatic trigger in 2.1.8.** Transmittal 8179, (seen as exhibit L in petitioners initial filing) would have mandated that when substantially all of the traffic was transferred it would require (trigger) **that the plan and it's associated S&T obligations** would have to be transferred.

351) A plan transfer would have been required, not just a traffic only transfer. However, AT&T lost its Substantial Cause Pleading to the FCC as Mr. Meade, and Mr. Carpenter, confess and thus the status quo of para "B's obligations language remained the same: **S&T obligations did not transfer on traffic only transfers, no matter how many accounts were transferred.**

352) Obviously, if there was a *different* provision already within 2.1.8, prior to the filing of Tr. 8179, that mandated S&T obligations transfer on traffic only transfers, AT&T would not have attempted to file Transmittal 8179 retroactively. Common sense mandates that if AT&T actually had *different* language within 2.1.8 to stop the partial traffic only transfer, there would have been absolutely no reason to 1)

first misrepresent[14] to the FCC in 1995 that S&T was included within minimum payment period and then 2) File Tr. 8179 seeking retroactive status.

353) If Tr. 8179 went into 2.1.8., as a "C" paragraph is totally irrelevant. It does not change the fact that AT&T was attempting to "change" the status quo as 2.1.8's para "B's" obligations language as para "C" would have imposed stipulations upon and thus substantially changed what occurs under para "B" on substantial traffic transfers. Therefore it would modify the all obligations meaning which pertains to only what is transferred as AT&T's counsel explained to both the Third Circuit and the DC Circuit.[15]

355) Mr. Meade's and Mr. Carpenter's admissions that must be taken for what they are: admissions that AT&T lost the Substantial Cause Pleading when the FCC evaluated 2.1.8's obligations language and the FCC did not allowed to retroactively change the Jan 1995 status quo of 2.1.8 and therefore S&T obligations did not

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[14] The FCC Freedom of Information Act (FOIA) notes show at exhibit M in petitioners initial brief that AT&T's position to the FCC was that S&T obligations were included within minimum payment period. The FCC response was:
"Moreover, the unexpired portion of any applicable min pay period would not seemingly include unexpired portion of any term of service and usage or rev commit but has its own unique meaning and, therefore, the provision about the term plan and commitments being included as part of the min pay period in conflicting and **we find in favor of customers in cases of conflicts**."
AT&T having initially taken the position that S&T obligations are encompassed within minimum payment period before the FCC and the District Courts (Politan's) non vacated first decision is barred from changing its position under the doctrine of judicial estoppel.

[15] The proposed Tr. 8179 paragraph "C" would **pertain to** paragraph "B"'s all obligation language is similar to the fact that the all obligations language in para B **pertains to** what is transferred (any number—not all numbers) of accounts in the opening sentence of 2.1.8.

transfer on petitioner's partial traffic only transfer.

356) When AT&T lost its Substantive Cause Pleading it settled for adding additional deposit requirements on a prospective basis, and therefore there was nothing within Tr. 9229 that would be determinative of the issue presented on the CCI/PSE transfer.

> The Deposit for Shortfall Charges included in Transmittal No. 9229 is a "new concept" that meets AT&T's business concern more directly, **without addressing the question of intent.** Because this is new, it will apply only to newly ordered term plans, and so would not be determinative of the issue presented on the CCI/PSE transfer. (Exhibit N pg.7 para 16 of initial filing.)

357) The problem with 8179 as the FCC saw it and the FOIA notes confirm, (exhibit M and K in initial petitioner filing) is that AT&T was looking to become a Kangaroo Court. AT&T wanted to make subjective calls on what the "intent" was of the aggregator, and could do so with no prior negative history, and even after complete documentation was shown of a legitimate business transaction.

358) AT&T saw that it would lose money by having the petitioners move $54.4 million in revenue to obtain an additional 38%. Here is a transaction in which the aggregator had already met its entire fiscal year obligation and was simply looking to obtain additional revenue.[16] The transaction made sure to take the traffic back

[16] See petitioners exhibit HH to initial filing showing petitioners were substantially over its revenue commitment and actually had gone well over its fiscal year commitment by over $26 million at the time of the traffic transfer. AT&T's attempt to utilize fraudulent use provisions would be a clear violation of 201(b) as it would be unfair and unreasonable. In fact FCC counsel during DC Circuit oral argument

and the payments were to go to CCI and Inga. Obviously you do not contract for payments to go to a company that you plan on bankrupting; especially one that controls special pre June 17th 1994 grandfathered plans that made it immune from S&T liabilities being inflicted due to restructure its contracts or use the section 2.5.7 shortfall waiver.

359) Still AT&T was attempting to use its fraudulent Use Provisions to stop a perfectly legitimate transaction. There is no absolutely no doubt that the FCC told AT&T either you withdraw 8179 or it is being rejected by the FCC. AT&T took the worse of two evils and withdrew it as to continue to delay.

XXIX AT&T's Own Argument Defeats Itself By Simultaneously Arguing Fraudulent Use Provisions And S&T Obligations Must Transfer On Traffic Only Transfers

360) More nonsense:

> But there is nothing logically **inconsistent** about invoking both § 2.1.8 and § 2.2.4 as bases for declining to process the proposed transfer.

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mentioned that one of the ways that petitioners could easily justify transferring its traffic was if it had already met its commitment.

> MR. BOURNE: There's another possibility is that if the transaction were to occur **mid-year,** for instance, and a carrier had **already met its minimum usage obligations**, then there wouldn't be any issue of -- now, I don't know the answer to that, but there --
> JUDGE GINSBURG: Okay, okay.

At the time the FCC counsel stated "I don't know the answer to that" but now the FCC has the undisputed fact that petitioners had already met its commitment.

> That transfer violated § 2.1.8 because PSE refused to assume shortfall and termination obligations, and it violated § 2.2.4 (among other fraud provisions) because **CCI, which would remain liable for shortfall and termination obligations under the joint and several liability provision,** was shedding the assets it needed to pay those charges. **In any case, AT&T was entitled to rely on the fraudulent use provision in the event the Commission concluded that § 2.1.8 did not apply to traffic transfers at all.** Such an alternative legal argument is obviously not a "concession" that the principal legal argument is invalid.

AT&T's argument is full of nonsense. "In the event the Commission concluded that § 2.1.8 did not apply to traffic transfers at all" or any other section of the tariff did not apply, AT&T would have won and not have needed the bogus secondary fraud provisions defense. Petitioners point is right on the money, that when AT&T argued that it was being defrauded over potential shortfall obligations that remained with the transferors plan it was conceding that plan obligations don't transfer on traffic only transfers. The fraud provisions are barred by the 15 day statute of limitation in section 2.1.8.

361) There is nothing in this record that shows that PSE ever refused to accept obligations. As detailed previously AT&T attempted to manufacture such a defense by introducing it 10 years after the transaction in 2005, and attributing statements short quoted and then taken out of context. PSE completed the AT&T TSA transfer form which is verbatim 2.1.8 and accepted all obligations necessary.

362) AT&T's fraud position is inconsistent with its bogus theory that actual S&T obligations are transferred to PSE and CCI remains liable for joint and severally liability. Under AT&T's bogus theory on joint and several liability pertaining to traffic only transfers, this would by definition mean that if Petitioners had joint and

several liability then PSE would have the actual obligations. AT&T counsel tried to quickly create a defense 12 years too late that defeats itself.

AT&T would **not** be able to claim fraud because PSE would have the actual obligations according to AT&T's "repair for all its counsel."

363) According to AT&T all its counsels the obligations that they were referring to as staying with CCI were the joint and several liability obligations. If CCI did have joint and several liability that by definition means that PSE has the actual obligations and thus according to AT&T it wouldn't in that case claim fraud. This is what happens when you have ten AT&T counsel all working on the case each quickly creating its own bogus defenses and all the misrepresentations start conflicting.

364) AT&T is stating that petitioners are "shedding the assets it needed to pay the charges". Even if the plans had no protection from shortfall the accounts that were temporarily being moved to PSE's plan would produce the income that goes to CCI/Inga which were responsible for S&T obligations. You don't pay with assets. Assets produce income. You pay with cash!

Finally AT&T is barred from using its fraud provisions due to the illegal remedy used.

XXX AT&T Failed the 15 day Statute of Limitations Evaluation Period Within Section 2.1.8

365) AT&T asserts on page 35 para 1:

> Accordingly, AT&T remained entitled to refuse to process petitioners' proposed transfer because it did not satisfy § 2.1.8's second condition.

> By its plain terms, this provision placed a limited third condition on the rights of resellers to transfer service. It manifestly did not condition AT&T's right to refuse to process transfers that failed to comply with § 2.1.8's other requirements.

366) AT&T is again misleading the FCC. The 15 days is not a provisioning time period it is an evaluation period.

Consider the District Court's May 1995 non vacated Decision page 7 para 1. This was page 62 of the Joint Appendix to the DC Circuit Court:

> Neither the Inga companies nor CCI received **any written notice of non-acceptance** by AT&T of their TSA's within **fifteen days** of December 16, 1994, the date of the original submission of the TSA's.

367) Consider the District Court's May 1995 non vacated Decision page 20 para 1. This was page 75 of the Joint Appendix to the DC Circuit Court:

> The parties properly executed the TSA's and **did not receive any notification of disapproval within the tariff-mandated fifteen day period**, and came to believe **– justifiably** – that the transfer had been **approved** and that CCI was the new customer of record on the plans.

It is clear from the non vacated District Court decision which AT&T did not even appeal that the 15 days period under 2.1.8 is a transaction evaluation period not a provisioning period.

368) In fact AT&T in May of 1996 filed another version of section 2.1.8 and it explained in detail that it was an evaluation period. **See EXHIBIT C ANNEXED HERE ON PAGE 164**

> **D.** The Current Customer will no longer be AT&T's Customer for the service as of the Effective Date of the transfer, which will be the **earlier**

of the date on which AT&T provides to the New Customer a written **acceptance** of the transfer or assignment, or the **fifteenth day** after AT&T receives a fully executed original of the Transfer of Service form, except:

1. The transfer will not be effective if, "**within fifteen days"** after AT&T receives a fully executed original of the Transfer of Service form, **AT&T provides to the New Customer a written rejection** of the requested transfer. AT&T may not unreasonably reject a transfer or assignment of service. AT&T may, for example, reject a transfer or assignment of service if the Current Customer or New Customer fails to supply the executed original(s) of the Transfer of Service form, fails to adequately identify the Current Customer or the service being transferred, asks that the transfer or assignment be made subject to conditions, or fails to furnish a deposit required in connection with the intended transfer pursuant to Section 2.5.8, following. **AT&T will provide a written statement of its reason(s) for rejecting a transfer or assignment of service.**

369) Under AT&T's definition it can indefinitely deny a transaction and force customers to have to bring claims against AT&T for failure to process the transaction, and then subjectively judge each transaction. No one is denying AT&T the right to evaluate each transaction but it must first notify the parties that it is temporarily denying service. Here AT&T did not do so. All commercial activity (buy sell agreements, division sell offs, seller buy backs, mergers and acquisitions etc) all could be held up while AT&T waits indefinitely to process the orders.

370) The 15 days did not require AT&T to evaluate the entire transaction within 15 days. All AT&T had to do was simply notify parties that it was holding the transaction for evaluation, and explain what its concerns were and allow the parties to clarify, but AT&T did not even do that.

According to AT&T it should have the capacity to simply not process substantial transfers and then claim that it is its subjective belief that there was fraud going

on. The FCC FOIA notes clearly state that AT&T should not be allowed to subjectively determine intent. Here the commitments were met and the plans, as AT&T now concedes, were grandfathered. There simply was no justification not to process the transfer.

371) Statute of limitations goes both ways. How many aggregators are out there have valid claims that have been stopped due to statute of limitations? AT&T can not have it both ways.

What about all the issues that go into deciding the case. AT&T raised issues of fraud, interpreting notations on TSA's; changing its belief where S&T are located (within minimum payments or within the term all obligations); changing positions regarding whether or not the transferors plan has joint and several liability on a traffic only transfer; whether PSE supposedly assumed one obligation or no obligations or just two obligations.

372) The "Discovery of Harm" Rule:

All these so called issues are present at the time of transfer. AT&T wishes to toll the statue of limitations indefinitely. The tolling of the Statute of Limitations may occur when dealing with minors; or a person not realizing it was harmed, such as in a medical case where the gestation of the claim manifests itself after the Statute of Limitations. However, in the case at hand all the things that AT&T raises were easily identifiable at the time of transfer. The 15 days therefore must from the time that AT&T knew (or should reasonably have known) that it believed it had suffered harm, and the nature of that harm. AT&T didn't raise any issues within the 15

days. **Only those issues raised by AT&T within the 15 day period should be open for review**. Since AT&T was silent on all issues, the 15 day Statute of Limitations prohibits AT&T from raising any issues.

373) If AT&T raised the issue that it wanted S&T obligations to transfer within the 15 days then that would be a justifiable tolling of the transaction, but AT&T did not.

If AT&T raised an issue that it wanted S&T obligations to transfer within the 15 days because that is what it believed how its tariff should be interpreted but did not raise other reasonably discoverable issues then none of the other issues are tolled. Here is the

> **Transfer or Assignment** – WATS, including **ANY** associated telephone **number**(s), may be **transferred or assigned** to a new Customer, provided that:
>
> C. The Company acknowledges the **transfer or assignment** in writing. The acknowledgement will be made within 15 days of receipt of notification.

374) The 15 days speaks to the submission of the 2.1.8 TSA contract and all that is included within the 2.1.8 TSA contract. It is not a provisioning period statement. Provisioning times are not tariffed items. AT&T has ordering times in its tariffs but this 15 days as per AT&T's agreement with the non vacated District Court Decision was an evaluation time that AT&T did not adhere to.

375) AT&T was giving itself 15 days to evaluate the transfer not process the transfer. If it was a processing time declaration it would say: The transaction will be processed within 15 days.

AT&T's tariff did not say that this 15 day period is the time AT&T has to process the order if AT&T determines that it is in compliance with the tariff.

376) The FCC is well aware that AT&T's briefs rambled on to the DC Circuit how 2.1.8 was the way to provision accounts due to how easy it was to bulk transfer with no signatures and no installation etc. The whole point AT&T was making was that provisioning was a snap. Hit a computer button and the accounts transfer from one AT&T customer to another. The DC Circuit was impressed with AT&T's 2.1.8 provisioning simplicity argument as it even stated on pgs. 9-10 exhibit C to petitioner's initial filing:

> AT&T argues that the transfer provision, Section 2.1.8, was indeed precisely because there are practical benefits to a transfer that would be lost through a transaction of the sort hypothesized by the Commission. These include guarantees against service interruptions and the loss of particular 800 numbers, as well as the exemption from a requirement that resellers obtain their end-users' written consent prior to the transaction. See AT&T Br. At 21-23.

377) AT&T's was asserting how easy it was to move end-users who all were on AT&T's underlying network. It was as easy as hitting a button and instantaneously changing the aggregator ID from CCI to PSE. The 15 day period could not have possibly meant that AT&T needed 15 days to provision end-users. It was a 5 minute process according to AT&T's Joyce Suek. The 15 days was obviously a transfer evaluation period.

Further evidence of this point can be seen when subsequent versions of 2.1.8 increased the evaluation period from 15 days to 30 days. It is an would be absurdity to believe that AT&T needed 15 days to do a paperwork transfer; let alone 30 days.

378) AT&T is responsible in knowing its tariff. All AT&T would have had to do is indicate the issues within 15 days then those issues would have been tolled; but AT&T did nothing as far as notify customers. What AT&T did do is run to the FCC without customers knowledge and try to convince the FCC that it could retroactively change its tariff. AT&T should have notified customers not the FCC. Thus the 15 days speaks to the totality of the transaction ordered.
AT&T counsel Fred Whitmere sent a letter to petitioner's dated February 6th 1995 (Exhibit X in plaintiffs initial Sept 27th filing) questioning for the **first time** plaintiffs traffic only transfer transaction. Mr. Whitmer was advised that there was no hanky panky going on. Still AT&T denied the traffic only transfer. Now look at exhibit F in petitioner's initial filing and see the traffic transfer requests (TSA's and cover letter) were latest dated Jan 13th 1995. AT&T has never disagreed that it received the traffic transfer request on time.

379) The FCC has the clear undisputed fact that AT&T was in violation of 2.1.8's 15 day statute of limitations. Once it was determined that 2.1.8 allowed traffic only transfers as petitioners did, all additional AT&T claims are barred by 2.1.8's 15 day statute of limitations. The FCC would stand law upside down not to adhere to clear statute of limitations law. If the FCC were to disregard statute of limitations law it

would subject itself to the opening of cases after its own 2 year statute of limitations, and render statute of limitations totally meaningless.
Any ambiguity in the tariff must be construed against the carrier and the 15 days statute of limitations must be enforced.

XXXI Discrimination on the Traffic Only Transfer

380) AT&T states that the FCC should not address the discrimination claims; however it was Judge Bassler who stated that this was an open issue.
Because if petitioners were not allowed transfer traffic only and keep its S&T obligations but other AT&T customers were, this would be discrimination.
Mr. Guerra agreed: Page 20 line 22 District Court Oral argument: May 2006:

> The Court: **What the FCC is saying there, there's a question of unlawful discrimination.**
> They've already decided the question of interpretation, but the **plaintiffs put another issue in front of them.** They said to the extent we're supposed to transfer all these obligations under 2.1.8. **AT&T has allowed thousands of other transfers to go through where they didn't require that. That's a form of discrimination** under Section 203.
> MR. GUERRA: The FCC says, we're not going to resolve discrimination claims here because A: We don't need to; B, it's inefficient because termination is a fact question and you can litigate those fact questions.
> THE COURT: Let's assume it goes back to the agency and it agrees with your position. Still going to have this issue of discrimination in this Court. Right?
> MR. GUERRA: **You would, your Honor. I believe you would.**

381) Judge Bassler is stating that discrimination is an open issue. The Courts position is that even if the FCC agreed with AT&T on the traffic transfer, the petitioners already had claims before the FCC. The Court noted that the facts clearly showed that "AT&T has allowed thousands of other transfers to go through

where they didn't require that." What the Court was obviously referring to was the transferor's shortfall and termination obligations. Discrimination is obviously an issue the Court raised itself.

382) AT&T's amendment to 2.1.8 in May of 1996 state only from that time did AT&T mandate that the obligations could not have been altered by the former customer and new customer Therefore a reasonable understanding of 2.1.8 prior to May 1996 was that the former customer and new customer were able to negotiate which obligations each was going to transfer/assume as long as AT&T had all obligations covered by one of the two parties.

2.1.8 in May 1996 states in reference to this:

> **A.** The Customer of record (Current Customer) requests in writing (using a standard AT&T Transfer of Service form available from AT&T)* that AT&T transfer or assign the service to the New Customer. **The standard AT&T Transfer of Service form shall not contain terms that are inconsistent with the terms of this Section, and shall not impose any obligations on the Current Customer or the New Customer other than as provided in this Section.**

And….

> 1. The transfer will not be effective if, **within fifteen days** after AT&T receives a fully executed original of the Transfer of Service form, AT&T provides to the New Customer a written rejection of the requested transfer. AT&T may not unreasonably reject a transfer or assignment of service. AT&T may, for example, reject a transfer or assignment of service if the Current Customer or New Customer fails to supply the executed original(s) of the Transfer of Service form, fails to adequately identify the Current Customer or the service being transferred, asks that the transfer or assignment be **made subject to conditions**, or fails to furnish a deposit required in connection with the intended transfer pursuant to Section 2.5.8, following. AT&T will provide a written statement of its reason(s) for rejecting a transfer or assignment of service.

383) Petitioners firmly believe that traffic only transfers mandate that S&T obligations must stay with the transferor; but if petitioners are wrong it appears that prior to May 1996 AT&T was allowing all traffic only transfers to take place where the transferor keeps AT&T obligations. It appears that AT&T was allowing the transferor and the transferee to negotiate which obligations it would take. Thus even if petitioners position is wrong AT&T was allowing this for all other aggregator traffic only transactions so AT&T really can not take the position that there other traffic only transactions were in violation of its tariff prior to May of 1996.

384) Therefore even if petitioner's position is wrong that S&T do not transfer on traffic only transfers, AT&T can't claim that the thousands of other traffic only transactions done prior to May 1996 that were done exactly as petitioners were in violation of its tariff. It certainly appears that prior to May 1996 AT&T permitted under 2.1.8 traffic only transfer transactions in which the aggregator kept its S&T obligations. Therefore even if it is found that the transaction was not permissible (which we don't agree it wasn't permissible); it would still be discrimination against AT&T for allowing all others and not petitioners.

AT&T again asserts on page 37 para 2:

> Indeed, as the colloquy between the Court and AT&T's counsel makes clear, the Court recognized (and AT&T agreed) that this issue would be presented to the Court, not to the Commission, if AT&T prevailed on the tariff interpretation question. See Petn. at 26.

385) AT&T admits that these discrimination issues will need to be addressed by the Court; however the Court still needs FCC interpretation as to whether AT&T can

discriminate, otherwise all parties are back to the FCC again. The FCC needs to address the discrimination issues as there are no disputed facts. AT&T admits and the Court found that AT&T did thousands of these traffic only transfers without S&T obligations transferring. There are no disputed facts here. Petitioners in 2003 evidenced the certification of Bob Collette stating he was able to do exactly what petitioners did. There is no way that AT&T can say that it was not allowing traffic only transfers without S&T obligations transferring.

> JUDGE ROBERTS: But you've allowed that in the past without requiring any transfer of obligations.
> MR. CARPENTER: That's a very much disputed issue that **the FCC didn't resolve.**
> JUDGE ROBERTS: Well, let me ask you, then, have you never before allowed anyone to transfer as much as one number without assuming any obligations?
> **I thought the record was pretty clear that that has been done.**

386) Yes, Judge Bassler also saw that the record clearly indicated that traffic only transfers without S&T obligations transferring were absolutely done as Judge Roberts had stated. The facts show that AT&T **did allow** this, thousands of times for other AT&T customers, as Judge Bassler stated. The fact that it also was an "open issue" in the DC Circuit that AT&T counsel itself stated was not resolved makes it an important issue to resolve.

XXXII There is also Discrimination Regarding the Ability to Obtain a Contract Tariff

387) The very reason why the traffic only transfer was done was because AT&T refused to provide petitioners with a contract tariff.

See District Court May 1995 non-vacated Decision page 10 line 3. This was page 65 to Joint Appendix to the DC Circuit.

> This second transfer was attempted because **CCI failed to obtain from AT&T** a KT-516 similar to that which PSE has.

388) AT&T's brief stated that Petitioners repeated claims for a contract tariff were not made until 2 years after the referral:

AT&T Dec 20th 2006 brief Page 36 para 1:

> The district court's May 1995 referral does not relate to petitioners' claim that AT&T violated Section 203 of the Communication Act concerning contract tariffs, which was first asserted almost two years after the referral, in petitioners' **March 1997 Supplemental Complaint.** See Exh. 15, 1111 (§ 6).

389) AT&T is flat out wrong. Judge Politan told AT&T counsel Fred Whitmere during the two day trial in 1995: Fred these people should have their own contract tariff.

Then further argument by petitioners concerning AT&T's refusal to a CT was made to the Third Circuit in **1996** prior to the referral (not in the 1997 supplemental complaint. AT&T responded…

AT&T REPLY brief to the Third Circuit: Page 24 para 2:

> Second, CCI attempts to deflect AT&T's argument that shortfall charges are necessary to **prevent discrimination** by making the incorrect and irrelevant charge that AT&T's "refusal to provide plaintiffs with service at its lowest rates" is itself discrimination. See CCI Br. at 39. The charge is incorrect because the FCC has held in the cases discussed above that AT&T is under no obligation to provide a reseller with "its lowest rates**," only to provide resellers with the same access to its tariffs as other similarly situated customers.**

390) Petitioners were not looking for the lowest rates as AT&T claims. Petitioners were receiving 28% discount on $54 million and CT-516 received 66% on $4.2 million volume commitment.

AT&T's reply brief to the Third Circuit pg 5 fn. 5 stated what the FCC's position was:

> Resellers should be able to buy services under the same terms as what other customers pay.

391) AT&T did not do that. AT&T simply refused all requests for a customized CT and also refused CT's that were open for the statutory 90 day window. Obviously if petitioners could have had a better contract it would have taken it as the new contract tariffs were all much deeper discounted and had lower commitments. Petitioners account rep informed petitioners "Al don't even ask anymore they are not giving you anything with all that volume you have."

392) There were about 1,400 CT's that were issued between 1994 and 2000 and AT&T would not allow petitioners access to any of them despite the fact that it easily qualified. AT&T has stated that petitioners needed to be "similarly situated." Due to the fact that 2.1.8 allows traffic only transfers, petitioners could have transferred into the CT whatever type of traffic pattern, dedicated vs. switched access, day/night calling etc. that the CT called for. However since AT&T was also denying access to 2.1.8 there was no way to remove thousands of accounts.

393) AT&T's failure to adhere to 2.1.8 also prevented petitioners from utilizing the CT's within the 90 day public window. Petitioners account manager Joseph Fitzpatrick laughed at petitioners and jokingly said "What are you going to do with a new CT anyway when we are no longer allowing you to move any of your accounts. What are you going to do take out the new CT commitment and not be able to put traffic on it?" See the exhibit I in the initial filing from Joyce Suek stating that AT&T is no longer doing partial TSA's i.e. traffic only transfers. AT&T's claim that petitioners didn't ask for CT's is a farce. Of course petitioners wanted a better deal. What further facts does the FCC possibly need to rule on this? The evidence is clear as can be that petitioners were discriminated against.

394) AT&T denied everything and confused what the FCC's position was on obtaining a CT to the Third Circuit. Discrimination was an issue that was clearly before the Third Circuit and included in petitioners briefs in 2003. Exhibit MM in petitioner's initial filing is one of many requests for service denied by AT&T. The discrimination in obtaining a competitive CT is the reason why the traffic transfer was done. AT&T not only wouldn't provide a custom CT it wouldn't even allow petitioners to obtain a CT that was available for the statutory 90 day public period. Remember PSE and Tel-Save had to bring legal action against AT&T to get their copies of CT 516 which was originally customized for Thompson Financial Corporation.

395) Petitioners AT&T account representative flat out advised petitioners that petitioners are wasting its time even asking for a CT. Petitioners were doing $54.4

million with a 28% discount and CT 516 offered 66% on a paltry $4.2 million commitment. CT 516 was originated for Thompson Financial Corp. PSE and Tele-Save ordered it within the 90 day pubic window as did petitioners. Petitioners were denied all CT's and added the discrimination claims to the 1996 filing that covered all discrimination against petitioners.

396) AT&T is correct that in regard to the traffic only transfer and discrimination to obtain a CT: "the facts and legal analysis for those two claims are distinct" however there is a relationship. The discrimination of not allowing petitioners to obtain a CT was the sole reason why the traffic only transfer was attempted and petitioners needed to utilize 2.1.8 to move its enormous account base into certain CT's that had caps on the amount of locations in the CT's to prevent resale. Petitioners account manager advised petitioners that AT&T referred to these location caps within the CT's "aggregator walls."

397) The Court would of course want to know if AT&T really did have the right to refuse petitioner's access to a public CT or one of its own customized for it which it obviously qualified for. Just because petitioners sought to ameliorate its loss of end-users by moving the end-users to a more competitive CT, does not mean that the fundamental reason why it had to transfer traffic (the discrimination) goes away.

398) Whether the traffic transfer would have gone through or not the Court would want to know the answer to this. If the Court understood that AT&T had no right to

refuse access to public CT's the Court could use the CT's that were available to base damages on.

Look at this nonsense AT&T told the FCC in AT&T's Joint Petition for Declaratory Ruling: in 1996 at page 13 para 2:

> Second, Petitioners themselves could have ordered service under Contract 516 or any of a number of plans offering deeper discounts than their own CSTPII Plans. Petitioners did not avail themselves of these options because under the terms of the tariff, had they directly subscribed to these different plans and moved their end users to them, Petitioners would have still incurred shortfall charges under their existing CSTPII Plans-- the very liability which they sought to circumvent here.

399) The existing CCI/Inga plans would have been merged into a new CT. AT&T is wrong, the CSTPII plans wouldn't need to stay in existence with no accounts on the plans. Petitioners would have gladly merged its existing CSTPII plans into a better CT. AT&T had absolutely no defense as to why petitioners would not want a better deal, but chose to make up the ridiculous statement above.

400) There are no facts to discover. AT&T simply states it had no obligation to allow petitioner's access to a CT. This is wrong and the Court needs to know that this is a violation.

AT&T also states on page 38 para 1:

> In fact, in their prior submissions to the Commission, petitioners argued that "` [a]ny factual issues which need to be addressed in order to apply the tariff, after the tariff is interpreted by the Commission, can be addressed by the District Court.'" See Commission **2003 Decision** at ¶ 18 n.87 (quoting Petitioners' Reply at i).

401) AT&T totally disregards the fact that after the 2003 FCC decision the case went to the DC Circuit and it had issues with whether AT&T had routinely allowed other aggregators to act as aggregators did. Also, the case did go back to the NJ District Court where Judge Bassler expressly stated there is a discrimination issue open and based upon the facts of the record thousands of other AT&T customers were able to act as petitioners did. Indeed the facts have been determined by the District Court. As the record indicates it was AT&T that argued to the District Court that **all issues are before the FCC and there are no factual disputes.** AT&T is judicially estopped from changing its position from what it stated to Judge Bassler because Judge Bassler relied upon it to the detriment of petitioners ability to lift the stay.

XXXIII Conclusion

402) Petitioners have no doubt that the FCC now clearly sees the complete mockery of the judicial system AT&T has engaged in for over 12 years. Petitioners and AT&T could argue all day about theory but it comes down to **COMMON SENSE!** If ATT's bogus theory was ever a reality it wouldn't need to file 200 pages of absolute nonsense. Section 2.1.8 is AT&T's transfer section and AT&T claims it has done tens of thousands of traffic only transfers. All AT&T would have to do is simply show a few samples of its theory in the marketplace. AT&T can not do that because; **No Evidence Exists** because **AT&T's Theory Does Not Exist!** This is not a school book theory debate. These are real life common transactions and **AT&T has Zero**

Evidence. The traffic only transfers that have been exhibited **all support petitioners.** What does that tell you?

Petitioners respectfully request that the FCC put an end to AT&T's abuse of the legal system by issuing the following declaratory rulings requested…

XXXIV Declaratory Rulings Requested Recap Petitioners Respectfully Request that the FCC Issue Declaratory Rulings on the Initial Issues Requested

1) By not transferring the traffic specified in Jan. 1995 under section 2.1.8.

2) Due to section 2.1.8 not having explicit provisions.

3-A) By violating 201(b) for its unjust and unreasonable interpretation of its discontinuation

(restructure) provision on pre 6/17/94 plans, asserting the pre become post 6/17/94 when restructured prior to the 1st yr of a 3 yr. term. **3-B)** And/Or for violation of 203 that indicates the CSTPII plan is at least grandfathered for three years after the June 17th 1994 substantive change.

4) By not adhering to the 15 day statute of limitations requirement of 2.1.8. Once 2.1.8 was determined as allowing traffic only or plan transfers the question of which obligations is moot.

5) By not adhering to section 3.3.1.Q bullet 10 by using an illegal remedy: A) Initially applying the charges to the end-users instead of its customer the aggregator and B) inflicting shortfall charges upon end-user locations in excess of the end-users discounts.

6) The FCC should declare that S&T obligations should have been waived under 2.5.7. (Circumstance Beyond Customers Control) because of AT&T's interpretation that a discontinuance (restructure) was simultaneously both a new plan and not a new plan.

7) By engaging in discrimination under 202 of the Act by not providing petitioners' with a contract tariff despite qualifying for it and also refusing all 90 day public offerings.

8) As noted by the District Court by engaging in discrimination under 202 of the Act for allowing thousands of other AT&T customers to transfer traffic only, both prior to and well after the Jan 1995 denied traffic transfer, but not allowing petitioners.

9) By violating 201(b) for unjust and unreasonable use of its fraudulent use provisions when the record indicates that the fiscal year commitments were met, and the traffic could be taken back.

10) Discrimination- On same transaction taking the position with co-petitioner (CCI) that the S&T charges were **bogus** and therefore needing to pay CCI, while asserting petitioners S&T charges were **legit.**

11) The FCC should again declare that AT&T used an illegal fraudulent use remedy by permanently denying the traffic only transfer instead of temporarily suspending service and therefore AT&T can not rely upon such charges even if the were found legitimate.

12) For violating 201(b) for unjust and unreasonable position that its S&T charges were legitimate for petitioners but simultaneously taking the position to the IRS and Florida Revenue Department that the S&T charges were totally bogus.

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January 31st 2007

Respectfully Submitted,

One Stop Financial, Inc
Group Discounts, Inc
Winback & Conserve Program,

800 Discounts, Inc.

By: /s/ Frank Arleo
Frank Arleo
Its' Attorney

EXHIBIT REPLY A (District Court's May 1995 Decision) &

EXHIBIT REPLY B (District Court's March 1996 Decision) are uploaded on FCC server as separate attachments.

To follow are additional exhibits: REPLY C and REPLY D that are a part of the uploaded Word Doc.

REPLY C

AT&T COMMUNICATIONSTARIFF F.C.C. NO. 2

Adm. Rates and Tariffs	18th Revised Page 20
Bridgewater, NJ 08807	Cancels 17th Revised Page 20
Issued: **May 9, 1996**	Effective: May 10, 1996

2.1.8. Transfer or Assignment - WATS, including ***any*** associated telephone numbers, may be transferred or assigned to a New Customer, subject to each of the following provisions: Sx ..

A. The Customer of record (Current Customer) requests in writing (using a standard AT&T Transfer of Service form available from AT&T)* that AT&T transfer or assign the service to the New Customer. The standard AT&T Transfer of Service form shall not contain terms that are inconsistent with the terms of this Section, and shall not impose any obligations on the Current Customer or the New Customer other than as provided in this Section.

B. The New Customer notifies AT&T in writing (using the same Transfer of Service form signed by the Current Customer)* **that it agrees to assume all obligations of the Current Customer as of the Effective Date of the transfer.** These obligations include, **for example:** all outstanding indebtedness for the service, the unexpired portion of any applicable minimum payment period(s), the **unexpired portion** of any term of service and usage and/or revenue commitment(s), and any **applicable** shortfall or termination **liability(ies).** .. **Sx**

C. The service is not interrupted at the time the transfer or assignment is made. Sx Sx

D. The Current Customer will no longer be AT&T's Customer for **the service** as of the Effective Date of the transfer, which will be the earlier of the date on which AT&T provides to the New Customer a written acceptance of the transfer or assignment, or the fifteenth day after AT&T receives a fully executed original of the Transfer of Service form, except: Sx Sx Cy .. Cy

1. The transfer will not be effective if, within fifteen days after AT&T receives a fully executed original of the Transfer of Service form, **AT&T provides to the New Customer a written rejection** of the requested transfer. AT&T may not unreasonably reject a transfer or assignment of service. AT&T may, for example, reject a transfer or assignment of service if the Current Customer or New Customer fails to supply the executed original(s) of the Transfer of Service form, fails to adequately identify the Current Customer or the service being transferred, asks that the transfer or assignment be made subject to conditions, or fails to furnish a **deposit required in connection with the intended transfer pursuant to Section 2.5.8, following**. **AT&T will provide a written statement of its reason(s) for rejecting a transfer or assignment of service.** **Ny** .. Ny

Cy

* The requirement that the transfer or assignment be made using the standard AT&T Transfer of Service form shall apply to transfer or assignment requests made on or after July 1, 1996.

Certain material previously found on this page can now be found on Page 20.1.

x Effective date of material filed under Transmittal No. 9229 is advanced to May 10, 1996 under authority of Special Permission No. 96-0468.

y Issued on not less than one day's notice under authority of Special Permission No. 96-0468.

2.5.6.B. Deposit for Shortfall Charges - (Continued)

2. The Customer is in one of the following categories (a) through (c). For purposes of these determinations, if any commitment under the Pricing Plan is based on charges or usage over a period of longer than one year, the commitment will be treated as an annual commitment equal to the amount of the commitment, divided by the number of months in the commitment period, multiplied by twelve. Mx . . . . Mx

(a) AT&T has accepted the Customer's order for service under the Pricing Plan and the Customer has identified at least one location or telephone number to be served under the Pricing Plan, but the total annualized charges or usage from all such identified locations and telephone numbers are less than 50% of the annual commitments applicable during the first year of the Pricing Plan. Such total annualized charges or usage will be twelve times the greater of (i) the past month's billed usage or (ii) the average monthly billed usage during the preceding twelve months, or if billed usage information is not available for the preceding twelve months, then during the number of preceding months for which such billed usage information is available. Mx Cx . . Cx Mx . . . . Mx

(b) The Customer has been taking service under the Pricing Plan for at least six full billing months, and the total annualized charges or usage under the Pricing Plan are less than 85% of any currently applicable annual commitment under the Pricing Plan. Such total annualized charges or usage will be twelve times the greater of (i) the past month's billed charges or usage or (ii) the average monthly billed charges or usage during the preceding twelve months, or if billed usage information is not available for the preceding twelve months, then during the number of preceding months for which such billed usage information is available. Cx Cx Cx Cx

Traffic Only transfers:

(c) The Customer has requested that AT&T remove specified locations or telephone numbers from the Pricing Plan, and the total annualized charges or usage from the locations or telephone numbers that would remain under the Pricing Plan are less than 50% (during the first six full billing months of the term of the Pricing Plan), or 85% (after the sixth full billing month of the term of the Pricing Plan), of any currently applicable "commitment under the Pricing Plan". Such total annualized charges or usage will be determined using the same methodology as specified in (b), preceding. Cx Cx

[Petitioners note: Of course AT&T wants the deposit to go on the transferors plans only (not the transferee) because AT&T understands that the transferors plan is holding the S&T obligations as per 2.1.8 and has transferred away locations (traffic only transfer). This makes sense, not the AT&T nonsense in which AT&T states that the S&T obligations transfer from the transferor (CCI/Inga) to the transferee (PSE) on a traffic only transfer.
[As noted here the Commitment under the transferors plan stays with the traffic transferors' plan as per this traffic only transfer]

Certain material on this page formerly appeared on Page 28.
Certain material previously found on this page can now be found on Page 28.1.1.
x Issued on not less than one day's notice under authority of Special Permission No. 96-0468.

REPLY D

Title 47: Telecommunications

§ 61.2 General tariff requirements.

(a) In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.

(b) Tariff publications must be delivered to the Commission free from all charges, including claims of postage.

(c) Tariff publications will not be returned.

§ 61.54 Composition of tariffs.

(a) Tariffs must contain in consecutive order: A title page; check sheet; table of contents; list of concurring, connecting, and other participating carriers; explanation of symbols and abbreviations; application of tariff; general rules (including definitions), regulations, exceptions and conditions; and rates. If the issuing carrier elects to add a section assisting in the use of the tariff, it should be placed immediately after the table of contents

(i)(1) *Symbols, reference marks, abbreviations.* **The tariff must contain an explanation of symbols, reference marks, and abbreviations of technical terms used. The following symbols used in tariffs are reserved for the purposes indicated below:**

R to signify reduction.

I to signify increase.

C to signify changed regulation.

T to signify a change in text but no change in rate or regulation.

S to signify reissued matter.

M to signify matter relocated without change.

N to signify new rate or regulation.

D to signify discontinued rate or regulation.

Z to signify a correction.

(j) *Rates and general rules, regulations, exceptions and conditions.* The general rules (including definitions), regulations, exceptions, and conditions which govern the tariff **"must be stated clearly and definitely**." All general rules, regulations, exceptions or conditions which in any way affect the rates named in the tariff must be specified. A special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate.

Rates must be expressed in United States currency, per chargeable unit of service for all communication services, together with a list of all points of service to and from which the rates apply. They must be arranged in a simple and systematic manner. **Complicated or ambiguous terminology may not be used,** and no rate, rule, regulation, exception or condition shall be included which in any way attempts to substitute a rate, rule, regulation, exception or condition named in any other tariff.